United Nations

Report of the Preparatory Committee on the Establishment of an International Criminal Court

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Volume I

(Proceedings of the Preparatory Committee during March-April and August 1996)

General Assembly
Official Records • Fifty-first Session
Supplement No.22 (A/51/22)

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VOLUME I

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I. INTRODUCTION

1. The Preparatory Committee on the Establishment of an International Criminal Court met at United Nations Headquarters from 25 March to 12 April 1996 and from 12 to 30 August 1996, in accordance with General Assembly resolution 50/46 of 11 December 1995.

2. Under paragraph 2 of that resolution, the Preparatory Committee was open to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency. [1]/

3. Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, opened the session, represented the Secretary-General and made an introductory statement.

4. Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the Preparatory Committee; Mr. Manuel Rama-Montaldo, Deputy Director for Research and Studies, acted as Deputy Secretary; Ms. Mahnoush Arsanjani and Ms. Sachiko Kuwabara-Yamamoto, Senior Legal Officers; Ms. Christiane Bourloyannis-Vrailas, Mr. George Korontzis, Mr. Mpazi Sinjela and Ms. Virginia Morris, Legal Officers; and Ms. Darlene Prescott and Mr. Renan Villacis, Associate Legal Officers, acted as assistant secretaries.

5. At the 1st meeting, on 25 March 1996, the Preparatory Committee elected its Bureau, as follows:

Chairman: Mr. Adriaan Bos (Netherlands)

Vice-Chairmen: Mr. Cherif Bassiouni (Egypt)
Mrs. Silvia A. Fernández de Gurmendi (Argentina)
Mr. Marek Madej (Poland)

Rapporteur: Mr. Jun Yoshida (Japan)

6. Also at the 1st meeting, the Preparatory Committee adopted the following agenda (A/AC.249/L.1):

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Organization of work.
5. Further consideration of the major substantive and administrative issues arising out of the draft statute for an international criminal court prepared by the International Law Commission and, taking into account the different views expressed during the meetings, drafting of texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.
6. Adoption of the report.

7. The Preparatory Committee had before it, in addition to the draft statute for an international criminal court adopted by the International Law Commission

(ILC) at its forty-sixth session, 2/ the report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 3/ the comments received pursuant to paragraph 4 of General Assembly resolution 49/53 of 9 December 1994 on the establishment of an international criminal court (A/AC.244/1 and Add.1-4) and a preliminary report submitted by the Secretary-General pursuant to paragraph 5 of that resolution, on provisional estimates of the staffing, structure and costs of the establishment and operation of an international criminal court (A/AC.244/L.2). Also before it was the Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission at its forty-eighth session; 4/ the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; 5/ and Principles Guaranteeing the Rights and Interests of Victims in the Proceedings of the Proposed International Criminal Court. 6/

II. ORGANIZATION AND METHODS OF WORK

8. The work of the Preparatory Committee during its March-April session followed the programme suggested by the Bureau and focused on the following questions: scope of jurisdiction and definition of crimes, at its 1st to 6th meetings, on 25, 26 and 27 March; general principles of criminal law, at its 7th to 10th meetings, on 28 and 29 March; complementarity, at its 11th to 14th meetings, on 1 and 2 April; trigger mechanism, at its 15th to 18th meetings, on 3 and 4 April; and cooperation between the court and national jurisdictions, at its 19th to 23rd meetings, on 8, 9 and 10 April.

9. During the Committee's consideration of the above questions, delegations put forward various suggestions and proposals, some of which were in written form. For the purpose of illustrating some of the major issues involved, they were brought together and compiled under the following headings: general principles of criminal law (A/AC.249/CRP.9); complementarity (A/AC.249/CRP.9/Add.1); trigger mechanism (A/AC.249/CRP.9/Add.2 and 3); and cooperation between the Court and national jurisdictions (A/AC.249/CRP.9/Add.5). These compilations were by no means exhaustive in their inclusion of all suggestions and proposals put forward by the delegations; delegations were encouraged to submit additions to the Secretariat for inclusion. The Committee did not discuss these papers and does not wish to prejudge the future positions of delegations.

10. With respect to the definition of crimes, a series of Chairman's informal texts was issued in a document (A/AC.249/CRP.9/Add.4) under the following headings: genocide, aggression, war crimes and crimes against humanity. The document also included a compilation of proposals and suggestions submitted by delegations. These are also illustrative texts which are not exhaustive and do not necessarily reflect any general views on the debate. The Committee did not discuss the document.

11. The work of the Preparatory Committee during its August session followed the programme suggested by the Bureau. To guide the discussion, the Chairman prepared lists of questions which were formulated in connection with specific articles of the draft statute prepared by the International Law Commission. The main topics considered were: procedural questions, fair trial and rights of the accused, at its 33rd to 36th meetings, on 15, 16 and 19 August 1996; organizational questions (composition and administration of the Court), at its 37th to 39th meetings, on 20 and 21 August 1996; and the establishment of the Court and its relationship with the United Nations at its 42nd and 43rd meetings, on 26 August 1996.

12. At the invitation of the Preparatory Committee, the Office of the Prosecutor of the International Tribunal for the former Yugoslavia presented, in an informal meeting, a statement on its work and an explanation, which were followed by an exchange of views with the representatives of the Tribunal.

13. During its August session, the following written proposals were submitted:

A/AC.249/L.2	Draft set of rules of procedure and evidence for the Court: working paper submitted by Australia and the Netherlands
A/AC.249/L.3	Draft statute: working paper submitted by France

A/AC.249/L.4	Applicable law and general principles of law: working paper submitted by Canada
A/AC.249/L.5	International cooperation and judicial [mutual] assistance: working paper submitted by South Africa and Lesotho
A/AC.249/L.6	Rules of procedure: working paper submitted by Argentina
A/AC.249/L.7	Tentative draft on procedure: working paper submitted by Japan
A/AC.249/L.8	Proposals on the organization of the Court: working paper submitted by Japan
A/AC.249/WP.1	Proposal submitted by Germany for article 26
A/AC.249/WP.2	Proposal submitted by Singapore for articles 26, 27, 29 and 33
A/AC.249/WP.3	Proposal submitted by Switzerland for articles 34 and 36
A/AC.249/WP.4	Proposal submitted by Switzerland for articles 9 and 26 to 29
A/AC.249/WP.5	Proposal submitted by the United States of America on general principles of criminal law
A/AC.249/WP.6	Proposal submitted by the Netherlands for articles 5, 27, 37, 38, 44 and 48
A/AC.249/WP.7	Proposal submitted by Singapore for article 38
A/AC.249/WP.8	Proposal submitted by New Zealand for article 41
A/AC.249/WP.9	Proposal submitted by Switzerland for article 37
A/AC.249/WP.10	Proposal submitted by Austria for articles 26 to 29, 34, 36 and 51
A/AC.249/WP.11	Proposal submitted by Egypt for article 43
A/AC.249/WP.12	Proposal submitted by Denmark, Finland, Malawi, New Zealand, Nigeria, Norway and Sweden for articles 6 (5) and 12
A/AC.249/WP.13	Proposal submitted by Singapore for articles 45 and 48
A/AC.249/WP.14	Proposal submitted by Japan on international cooperation and judicial assistance
A/AC.249/WP.15	Proposal submitted by the United States of America for part 7
A/AC.249/WP.16	Proposal submitted by Argentina and Canada for articles 38, 38 *bis*, 41 and 43
A/AC.249/WP.17	Proposal submitted by the United Kingdom of Great Britain and Northern Ireland for articles 5, 6, 9 and 12
A/AC.249/WP.18	Proposal submitted by Austria for articles 9 and 11
A/AC.249/WP.19	Proposal submitted by Denmark for article 6

A/AC.249/WP.20	Proposal submitted by Portugal for article 6
A/AC.249/WP.21	Proposal submitted by Canada for article 45
A/AC.249/WP.22	Proposal submitted by the United States for article 6
A/AC.249/WP.23	Proposal submitted by the United Kingdom for article 6
A/AC.249/WP.24	Proposal submitted by Singapore for article 6
A/AC.249/WP.25	Proposal submitted by China for article 6 (3), (5) and (6)
A/AC.249/WP.26	Proposal submitted by Japan for articles 6 and 13
A/AC.249/WP.27	Proposal submitted by Switzerland for articles 6, 8 and 9
A/AC.249/WP.28	Proposal submitted by Austria for article 9
A/AC.249/WP.29	Proposal submitted by Singapore and Trinidad and Tobago for article 6
A/AC.249/WP.30	Proposal submitted by Finland for articles 6, 12 and 19
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A/AC.249/WP.40	Proposal submitted by Singapore on additions to the compilation of proposals on judicial cooperation and enforcement
A/AC.249/WP.41	Proposal submitted by the United States on offences against the integrity of the Court
A/AC.249/WP.42	Proposal submitted by Israel for articles 10 (2), 11 (2) and (3) and 16 (1)
A/AC.249/WP.43	Proposal submitted by Algeria, Egypt, Jordan, Kuwait, the Libyan Arab Jamahiriya and Qatar on the organization of the Court

A/AC.249/WP.44	Proposal submitted by Algeria, Egypt, Jordan, Kuwait, the Libyan Arab Jamahiriya and Qatar for article 47
A/AC.249/WP.45	Proposal submitted by Finland for articles 28 and 29
A/AC.249/WP.46	Proposal submitted by the Netherlands for article 47
A/AC.249/WP.47	Proposal submitted by Trinidad and Tobago for article 6
A/AC.249/WP.48	Proposal submitted by Japan on the definition of war crimes
A/AC.249/WP.49	Proposal submitted by New Zealand for article 2
A/AC.249/WP.50	Proposal submitted by Denmark for article 20
A/AC.249/WP.51	Proposal submitted by Singapore for article 23
A/AC.249/WP.52	Proposal submitted by Belize for article 20
A/AC.249/WP.53	Proposal submitted by Israel for articles 44, 45 and 47.

14. For the purpose of organizing the proposals in a coherent and manageable manner, interested States were encouraged to conduct consultations. For those purposes informal groups were formed on the following subjects: procedural questions (chaired by Ms. Silvia A. Fernández de Gurmendi, Argentina); international cooperation and judicial assistance (chaired by Mr. Pieter Kruger, South Africa); organizational questions (chaired by Ms. Zaitun Zawiyah Bt. Puteh and Mr. Kian Kheong Wong, Malaysia); and penalties (chaired by Mr. Rolf Einar Fife, Norway). The informal group on the general principles of criminal law continued its work (chaired by Mr. Per Saland, Sweden).

15. At the 45th meeting, on 27 August 1996, the chairmen of the respective informal groups reported on the outcome of their work.

16. At the same meeting, the Committee decided to incorporate into its report (see vol. II), together with the draft articles prepared by the International Law Commission, the compilations of proposals prepared by the informal groups, namely, procedural questions, fair trial and rights of the accused (A/AC.249/CRP.14); international cooperation and judicial assistance (A/AC.249/CRP.17); organization, composition and administration of the Court (A/AC.249/CRP.11); general principles of criminal law (A/AC.249/CRP.13); and penalties (A/AC.249/CRP.13/Add.1). The incorporation into the report of the above-mentioned compilations was done on the understanding that they did not represent texts agreed upon among delegations; they did not affect the status of national proposals nor did they necessarily represent the final position of the delegations which had submitted such proposals. The compilations were not exhaustive and the proposals contained therein had not necessarily been discussed in the informal groups.

17. A view was expressed that only the informal groups on general principles and on international cooperation had had the desirable degree of wide participation. Concern was expressed that in topics such as procedural questions, the compilation of texts on an article-by-article basis might lead to a loss of coherence in the national proposals involved.

18. Some delegations acknowledged the contribution of relevant organizations to the work of the Preparatory Committee as provided for in General Assembly

resolution 50/46, and in particular the representatives of civil organizations in the meetings of the Committee.

19. Appreciation was also expressed by a number of delegations for the renewed generous offer of the Government of Italy to host a conference on the establishment of an international criminal court.

III. DISCUSSION ON SUBSTANTIVE ISSUES

A. Establishment of the Court and relationship between the Court and the United Nations

20. The issues on which the debate focused were the following: status and nature of the Court and method of its establishment; relationship between the Court and the United Nations; and financing of the Court.

1. Status and nature of the Court and method of its establishment

21. There was general support for the view that the Court should be an independent judicial institution. While some favoured an autonomous international body, others preferred that the Court form part of the United Nations as, for example, a principal or subsidiary organ. It was noted in this regard that the status would be determined or affected by the method of creation selected (for instance, the International Tribunal for the former Yugoslavia was established as a subsidiary organ under Security Council resolutions 808 (1993) and 827 (1993)).

22. It was suggested that the Court should be a full-time, permanent institution, which would sit on a continuous basis for the purpose of prosecuting individuals accused of committing serious crimes. In the view of some delegations, this would promote stability and uniformity in jurisprudence and continuous development of the law. Others, however, favoured a permanent court which would meet only when a complaint was actually submitted to it, as proposed in article 4 of the draft statute of the International Law Commission.

23. It was suggested that the Court should possess international legal personality with treaty-making capacity. There was also a suggestion that the Court should be given competence to request advisory opinions from the International Court of Justice. Others pointed out that this would entail legal implications requiring further consideration.

24. It was suggested that the Court could function at least initially as provided for in articles 4 and 5 of the draft statute. The Presidency, the Prosecutor's office and the Registry (and perhaps one judge for the conduct of the investigation and indictment phase) could be of a standing nature, while the Trial or Appeals Chambers would be convened as required. This system was regarded as sufficiently balanced, at least for the initial functioning of the Court, and would not result in needless costs.

25. As concerns the method for establishing the Court, various suggestions were made: an amendment to the Charter of the United Nations making the Court a principal organ of the Organization similar to the International Court of Justice; a resolution adopted by the General Assembly and/or the Security Council; or the conclusion of a multilateral treaty. Some delegations expressed reservations on the establishment of the Court by a Security Council resolution. The first approach was considered ideal by some delegations, in that it would make the Statute an integral part of the Charter with binding effect on all Member States. It was, however, noted that this process would be complex and time-consuming, although another suggestion was to retain the option of reviewing the status of the treaty any time proposals for amendment to the Charter were otherwise being considered. To set up the Court by a resolution of

the General Assembly or of the Security Council as a principal or subsidiary organ thereof was considered by some to be efficient, time-saving and feasible pursuant to the advisory opinion of the International Court of Justice of 1954. It was, however, questioned whether a resolution of a recommendatory nature would provide the necessary legal force for the operation of the Court. There was also support for the establishment of the Court under a Security Council resolution. It was, however, pointed out that the Council's competence under the Charter to create ad hoc tribunals in response to a particular situation endangering international peace and security should be distinguished from the current endeavour of creating an international criminal court with general powers and competence.

26. To establish the Court by a multilateral treaty, as recommended by the International Law Commission, seemed to enjoy general support, as the treaty could provide the necessary independence and authority for the Court. States would have the choice whether to become a party to the treaty. The treaty could contain the Court's Statute and other instruments relevant to its creation and work (e.g., rules of the Court, instruments relating to privileges and immunities of the Court). In order to promote wider acceptance of the instrument, the General Assembly could adopt a resolution urging States to become parties to the treaty; the treaty itself could also provide for a review or an amendment mechanism and provisions for the settlement of disputes, which could, according to some, serve as an additional means to attract favourable consideration of the Court by States.

27. In order to maintain the treaty as an integral whole, a suggestion was made that the instrument should not permit reservations; others thought that this question might have to be reviewed at a later stage.

28. Different views were expressed on the number of ratifications required to bring the treaty into force, ranging from 25 to 90 ratifications. According to some, a relatively high number of ratifications would promote the representation of the principal legal systems of the world, all geographical regions and the idea of universality of the Court. On the other hand, the advantage of a lower number was that it could permit a relatively early entry into force of the treaty and would give early effect to the international community's desire to see the Court actually established. Still others suggested that a balance should be achieved to avoid too high a number, which could possibly delay the entry into force of the treaty, or too low a number, which would not provide an effective basis for the Court. It was suggested that the five members of the Security Council should be included among the number of ratifications required for the entry into force of the treaty. Some stressed, however, that early establishment of the Court be given more weight than the other considerations, and that a low number of ratifications would not necessarily preclude the requirement of geographical representation and representation of the major legal systems.

2. Relationship between the Court and the United Nations

29. A close relationship between the Court and the United Nations was considered essential and a necessary link to the universality and standing of the Court, though such a relationship should in no way jeopardize the independence of the Court. A special agreement, either elaborated simultaneously with the Statute (as an annex thereto) or at a later stage, to be concluded between the two institutions would be appropriate for the establishment of such a relationship. The agreement should, however, be

approved by the States parties to the Statute. In this regard, references were made to the agreements between the United Nations and the International Tribunal for the Law of the Sea and the International Atomic Energy Agency respectively.

30. It was further suggested that the general principles and substantive questions should be dealt in the Statute itself. The relationship agreement should deal only with such technical questions of an administrative nature as issues of representation, exchange of information and documentation, or provisions on cooperation between the two organizations. The agreement should be guided by and not be inconsistent with the provisions of the Statute.

31. A view was expressed that the Court could have a status analogous to that of a specialized agency. Articles 57 and 63 of the Charter of the United Nations concerning the status of specialized agencies and their cooperation with the United Nations would be relevant in such a case. Others questioned whether such a relationship would be appropriate for the envisaged status of the Court; further careful consideration would be required. Still others were of the opinion that such provisions were not relevant to the nature and functions of the Court and might subject it to the coordination and recommendations of the Economic and Social Council.

3. Financing of the Court

32. As regards the financing of the Court, the views were expressed that it should be effected from the regular budget of the United Nations as is the case with human rights monitoring bodies, since the Court would be dealing with international concerns, and that its financing should be certain and continuing. Moreover, if States parties were required to finance the Court, some States might be deterred from bringing cases before the Court owing to their financial situation, or the State in question might not be a party to the treaty. However, another view considered that the independence of the Court required States parties to finance it through their own contributions on the basis of the scale of assessments of the United Nations or another scale yet to be agreed. It was also noted that States initiating cases, interested States or even the Security Council (if it had referred a matter to the Court) could contribute to the financing. The examples of the Universal Postal Union and the Permanent Court of Arbitration were mentioned in this respect. In addition, the Court should also be open to voluntary contributions by States, organizations or even individuals and corporations. Reference was also made to a proposal for the establishment of a fund to be financed by voluntary contributions, as well as collected fines and confiscated assets. As concerns the institutional aspects of financing, it was suggested that a general assembly of the States parties could be held annually to consider administrative and financial issues and approve the budget. There was also a view that the consideration of the question of financing was premature at the current stage and should be considered later, after the structure and jurisdiction of the Court had been further clarified. It was suggested that a feasibility study be done so that all possible financing options could be considered. It was pointed out that the Secretary-General had prepared in 1995 certain preliminary estimates concerning the establishment of the Court (A/AC.244/L.2).

B. Organizational questions (composition and administration of the Court)

Article 5. Organs of the Court

33. With regard to article 5 dealing with organs of the Court, the view was expressed that an indictment or an investigations chamber for pre-trial procedures should be added and that it should be composed of three judges with the necessary authority to monitor preliminary investigative matters. A view was also expressed that a pre-trial chamber should be established to carry out such pre-trial procedures as issuing warrants and deciding upon indictment and admissibility. Others questioned the need for this, preferring the structure established in the draft by the International Law Commission. Another suggestion was made that there should be no rotation of judges between the various chambers so as to avoid the possibility of having any judge sit on the same case more than once.

34. A proposal was made to create special chambers to deal with certain cases, for example, genocide.

Article 6. Qualification and election of judges

35. It was stressed that the qualification of judges for the international criminal court was an issue that needed to be given careful consideration, taking into account the prominence and importance of the future Court. In addition to the qualifications already mentioned in the draft article of the International Law Commission, it was pointed out that the persons to be elected should also possess experience in humanitarian law and the law of human rights. The view was expressed that all judges should have criminal trial experience. In that context, it was further expressed that it was essential that judges to be appointed to the Trial Chamber should have criminal law experience, which does not necessarily imply criminal trial experience but may include the experience of a lawyer or a prosecutor. Other attributes should include high moral character, impartiality, personal integrity and independence. The view was expressed that the reference to "criminal trial experience" should be clearly defined. Some delegations expressed reservations about the requirement, in the draft prepared by the International Law Commission, of appointment to the highest judicial body, since several legal orders have a judiciary based on a career system. Doubts were expressed as to the advisability of establishing for the Court's composition a strict separation between judges with criminal trial experience and those with recognized competence in international law, as this might unduly complicate the election process. Persons competent in both areas were considered ideally suited for such positions.

36. It was pointed out that since the Court to be established should be universal in character, representing all systems of the world, there was the need for balance and diversity in its composition. It was therefore considered important that judges be elected on the basis of equitable geographical representation. In this connection, the formulation of the relevant rule of the Statute of the International Tribunal for the Law of the Sea was recalled. It was also emphasized that the Court's composition should ensure gender balance, particularly in the light of the fact that some of the crimes to be considered by the Court related to sexual assault of women and crimes against children. However, the view was also expressed that there should be no quota system for female judges, nor quotas of any kind, since the sole criteria should be the

high qualification and experience of the candidate. It was suggested that rules on qualification and election of judges should be more closely modelled on those governing the International Tribunal for the former Yugoslavia.

37. In order to attract the most qualified persons, the view was expressed that nomination of candidates for election to the Court should not be confined only to nationals of States parties; nationals of non-States parties should also be permitted. Another view expressed in this connection was that restricting nominations to nationals of States parties would act as an incentive for States to consider becoming parties to the convention. In order to ensure that merit would be a paramount consideration in the election of judges, suggestions were made to the effect that candidates should be nominated either by a nominating committee or by national groups, as in the nomination of candidates for the International Court of Justice.

38. Support was expressed for the idea that the election of judges should be carried out by the States parties to the Statute of the Court. It was however suggested that elections should be conducted either by the General Assembly, or by the Assembly together with the Security Council, as in the case of the International Court of Justice. According to another point of view, this matter was dependent on the kind of relationship the Court would have with the United Nations.

39. While there was broad support for the idea that the Court should be composed of 18 judges, the view was also expressed that a higher number, for example 21 or 24, should be considered, depending on the number of Trial Chambers to be created. The view was also expressed that a smaller number should be considered, for example 15 or even 12, particularly at the beginning, in order to cut costs. As a cost-saving measure, it was further suggested that consideration should also be given to the possibility of electing part-time judges who could be called upon on short notice whenever the need arose. The view was also stressed in this connection that consideration of cost savings should not be a major determining factor in the size or nature of the Court to be created.

40. As for the term of office, while there was widespread support for the proposal of the International Law Commission for a non-renewable nine-year term in order to promote the impartiality and independence of the judges, the view was also expressed that a shorter renewable term (e.g., five or six years) should be given serious consideration, in order to ensure geographic rotation and to attract the best qualified persons. A view was also expressed that while a judge should be allowed to continue in office in order to complete any case the hearing of which has commenced, there should be a limit placed on this extension. It was therefore suggested that the matter should be concluded within five years.

41. A proposal was made that judges should be subject to a retirement age (e.g., at 70 or 75 years). It was also observed that, in such a case, it would be desirable to set an age ceiling for persons being nominated to stand as candidates to the Court.

Article 8. The Presidency

42. It was suggested that the President's duties should be limited to ceremonial and administrative functions and that States parties should retain an oversight function over the administrative matters of the Court. It was stated

that the line of authority between the President and the Vice-Presidents should be clarified, as well as how decisions are taken within the Presidency (e.g., by consensus, by majority vote). The suggestion was made that the responsibility of the Presidency for the due administration of the Court should include supervision and direction of the Registrar and staff of the Registry, and security arrangements for the defendants, witnesses and the Court. It was also suggested that the functions of the Presidency could be extended to issues such as reviewing decisions of the Prosecutor not to pursue a case. Doubts were expressed as to the appropriateness of the Presidency exercising pre-trial and other procedural functions. In this regard, the establishment of an indictment or investigations chamber was suggested. The Presidency could preserve functions as regards execution of penalties.

Article 9. Chambers

43. It was proposed that paragraph 1 of article 9 should be clarified, particularly regarding the criteria on the basis of which the Appeals Chamber would be established. A body of opinion favoured a completely separate and independent appellate function and was against the rotation of judges between the Trial Chambers and the Appeals Chamber. It was further proposed that the Appeals Chamber, as well as the Trial Chambers, should be elected by the Court rather than appointed by the Presidency, as it was felt that this would enhance the objectivity of the Chambers. The views were also expressed that appointments to the Trial Chambers should be by rotation or by drawing lots. Chambers should invariably be composed of an uneven number of judges to constitute the quorum; judges should always be present at the proceedings of the Court. The need was also stressed for a mechanism to ensure that there would be a sufficient number of judges with criminal law experience in the Appeals Chamber. The suggestion was further made that pre-trial or indictment chambers should be constituted. It was noted in this connection that they could be permanent or established for a particular case or for a specific time period. It was suggested that a remand chamber should be created.

Article 10. Independence of the judges

44. It was pointed out that there were a number of ways to enhance the independence of the judges, such as the election procedure, length of terms, security of tenure and appropriate remuneration. The view was expressed that judges should not engage in any activities that would prejudice their judicial functions. In this connection, activities such as part-time teaching and writing for publication were considered compatible with such functions. It was suggested that any question arising in connection with the outside activities of the judges should be decided not by the Presidency but by an absolute majority of the Court, a solution that was in line with Article 16 of the Statute of the International Court of Justice.

Article 11. Excusing and disqualification of judges

45. The importance of the question concerning the excusing and disqualification of judges was stressed. It was suggested that the relevant article of the draft statute of the International Law Commission needed further elaboration in this respect. A suggestion was made to the effect that the terms of disqualification of a judge contemplated in paragraph 2 of article 11 should not extend to members of an indictment chamber having acted in this capacity. It was also

suggested to include in the Statute such specific grounds for the excusing and disqualification of judges as: that the judge is the injured party or a relative of the accused or of the injured party, or a national of a complainant State or of a State of which the accused is a national, or that the judge has acted as a witness, representative, counsel, public prosecutor or judge at the national level in the case involving the accused. Some of the above suggestions for inclusion gave rise, however, to reservations. The proposal was made that States parties should be able to raise questions concerning the disqualification of a judge. It was also suggested that more detailed rules should be developed to govern conflict of interest problems.

Article 12. The Procuracy

46. The view was expressed that the Statute should provide for an independent Prosecutor with experience in criminal investigations in order to ensure the credibility and integrity of the Court, and that it might be useful to look at the experience of the tribunals for the former Yugoslavia and Rwanda. It was further stated that the Prosecutor's office should be established to seek the truth rather than merely seek a conviction in a partisan manner. It was suggested that the Prosecutor and the Deputy Prosecutor should have experience in investigation as well as prosecution of criminal cases. It was also proposed that the age limit for the Prosecutor and the Deputy Prosecutor should be 70 years old. Their term of office should be fairly long, such as nine years, and non-renewable. As to the provision concerning the election of the Prosecutor and the Deputy Prosecutor, the view was expressed that further elaboration was required. The view was also expressed that the Prosecutor, like judges, should not be allowed to seek re-election, in order to avoid any political overtones associated with a re-election process. It was observed that the rules for disqualification of the Prosecutor needed further elaboration. It was suggested in that connection that he or she should not engage in any activity likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence (e.g., being a member of the legislative or executive branches of the Government of a State). It was also suggested that the Prosecutor should not act in relation to a complaint initiated by his or her State of nationality or involving a person of his or her own nationality or in any case in which he or she had previously been involved in any capacity. There were differing views on the need for disqualification based on nationality issues. It was also suggested that the grounds for disqualification of the Prosecutor should be similar to those for a judge. It was suggested that the term "Procuracy" was inappropriate and should be replaced by such designation as "the Office of the Prosecution". The view was also expressed that article 12 should be amended in order to reflect the opinion that the Prosecutor should also be authorized to initiate investigations ex officio, even in the absence of a complaint brought by a State party to the Statute. However, according to another view, such power should not be granted to the Prosecutor.

Article 13. The Registry

47. It was suggested that there should be included in the Statute guidance on the qualifications for the Registrar and the Deputy Registrar, in order to ensure that such offices would be vested in highly qualified persons. It was also suggested that the Registry should be under the direction of the Presidency or of the Court. The view was expressed that the functions of the Registrar needed elaboration and reference was made in this regard to the wording in

article 17, paragraph 1, of the Statute of the International Tribunal for the former Yugoslavia.

Article 15. Loss of office

48. The view was expressed that grounds for the removal of judges, the Prosecutor and the Deputy Prosecutor should be clearly stated in article 15. It was suggested that further to the grounds contemplated in the draft statute of the International Law Commission, reference should also be made to the engagement in delinquency, whether officially or privately, which could erode public confidence in the Court. The view was also expressed that a distinction should be made between conduct triggering loss of office and other kinds of conduct deserving less serious disciplinary measures.

Article 16. Privileges and immunities

49. The view was expressed that the privileges and immunities as expressed in the article were too broad and should be limited to official functions. Moreover, the privileges and immunities of the Court's staff should be waivable. A view was expressed that on-site functions of the Prosecutor and the counsels in the territory of a State were different functions than those performed by a diplomatic agent and that, therefore, the Prosecutor and the counsels did not need full diplomatic privileges and immunities. The point was also made that the scope of the privileges and immunities should be reformulated later, after the functions of each body of the Court had been well defined.

Article 19. Rules of the Court

50. It was suggested that the rules of the Court should be formulated on the basis of the principles set out in the Statute and could initially be reviewed by the States parties. Subsequently, the judges could adopt supplementary rules in accordance with the rules of the Court. According to other delegations, the judges should not be allowed to adopt rules of procedure, but could suggest the adoption of new rules to State parties. The view was expressed that, in the light of the experience of the International Tribunal for the former Yugoslavia, which had amended its rules nine times, a flexible procedure for amendment of the rules of the Court should be established.

C. Scope of the jurisdiction of the Court and definition of crimes

Article 20. Crimes within the jurisdiction of the Court

1. General comments

(a) Scope of jurisdiction

51. There was general agreement concerning the importance of limiting the jurisdiction of the Court to the most serious crimes of concern to the international community as a whole, as indicated in the second paragraph of the preamble, to avoid trivializing the role and functions of the Court and interfering with the jurisdiction of national courts. Several delegations emphasized the importance of consistently applying the jurisdictional standard referred to in the second paragraph of the preamble to the various categories of crimes.

(b) Definition of crimes

52. There was general agreement that the crimes within the jurisdiction of the Court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality (nullum crimen sine lege). A number of delegations expressed the view that the crimes should be clearly defined in the Statute. However, some delegations envisaged the Statute as a procedural instrument and expressed concern about possible duplication of or interference with the work of the International Law Commission on the draft Code of Crimes against the Peace and Security of Mankind.

53. Attention was drawn to the definitions of crimes contained in articles 17 to 20 of the draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission in 1996, with a view to considering the inclusion of such definitions in the Statute. Article 20 of the Statute should be reformulated along the lines of the draft Code, with each crime being defined in a separate article identifying the essential elements of the offences and the minimum qualitative and quantitative requirements. The definition of war crimes should clearly indicate in what circumstances, by which perpetrators and against which victims certain acts would constitute such crimes.

(c) Method of definition

54. Several delegations expressed the view that the crimes referred to in subparagraphs (a) to (d) should be defined by enumeration of the specific offences rather than by reference to the relevant legal instruments, to provide greater clarity and transparency, to underscore the customary law status of the definitions, to avoid a lengthy debate on the customary law status of various instruments, to avoid possible challenges by States that were not parties to the relevant agreements, to avoid the difficulties that might arise if the agreements were subsequently amended and to provide a uniform approach to the definitions of the crimes irrespective of whether they were the subject of a convention. Some delegations suggested that the two approaches could be combined for crimes covered by widely accepted conventions. There were also proposals to define the crimes by reference to the relevant conventions, such as the Genocide Convention and the Geneva Conventions. There was a further proposal to amend article 20 to indicate that the Court should apply the relevant international conventions and other sources of international law in interpreting and applying the definitions of crimes. Several delegations held the view that the Statute should codify customary international law and not extend to the progressive development of international law.

(d) Exhaustive or illustrative definition

55. Several delegations expressed a preference for an exhaustive rather than an illustrative definition of the crimes so as to ensure respect for the principle of legality, to provide greater certainty and predictability regarding the crimes that would be subject to international prosecution and adjudication and to ensure respect for the rights of the accused. However, some delegations expressed the view that it might not be possible to envisage all of the various offences, that exhaustive definitions might excessively restrict the jurisdiction of the Court and that in some instances it might be useful to retain an element of flexibility to permit the continuing development of the law.

(e) Elements of the crimes

56. Some delegations expressed the view that the constituent elements of the crimes should be set forth in the Statute or in an annex to provide the clarity and precision required for criminal law, to provide additional guidance to the Prosecution and the Court, to ensure respect for the rights of the accused and to avoid any political manipulation of the definitions. It was further stated by some delegations that States, and not judges, should be responsible for legislating the elements of the crimes. It was also suggested that the Statute could provide a mechanism under which the Court would elaborate the elements similar to the International Tribunal for the former Yugoslavia. However, other delegations expressed the view that it was not necessary to provide the detailed elements of the crimes, that the general definitions contained in the relevant instruments had been sufficiently precise for their practical application and that an elaboration of the elements of the crimes would be a complex and time-consuming task.

(f) Categories of responsible individuals

57. Several delegations expressed the view that it was important to consider the categories of individuals who could incur responsibility for the various crimes in the definitions thereof or in a general provision. Attention was drawn to the draft prepared by a committee of experts at Siracusa concerning the former approach.

2. Genocide

(a) Inclusion

58. There was general agreement that genocide met the jurisdictional standard referred to in the second paragraph of the preamble.

(b) Definition

59. Several delegations expressed the view that the Convention on the Prevention and Punishment of the Crime of Genocide provided an adequate basis for the definition of that crime; that the definition was authoritative, widely accepted and had attained the status of customary law, with reference being made to the advisory opinion of the International Court of Justice in this respect; and that the use of that definition would promote uniform jurisprudence in the field of international law. Several delegations also expressed the view that article II of the Convention should be reproduced without change. It was emphasized that the Preparatory Committee was not the appropriate forum for considering amendments to the Convention or for undertaking the codification or progressive development of law rather than defining the jurisdiction of the Court with respect to existing law.

60. Some delegations suggested that various aspects of the definition contained in article II required further clarification to provide the necessary guidance to the Court in its interpretation and application. With regard to the *chapeau* of article II, some delegations suggested that it might be necessary to clarify the intent required for various categories of individuals. However, other delegations suggested that the question of intent should be addressed under the applicable law or the general provisions of criminal law. Some delegations also suggested that the term "in part" required further clarification. Some delegations further suggested that consideration should be given to extending the definition to include social and political groups, while recognizing that

that question could also be addressed in connection with crimes against humanity.

61. As regards article II, subparagraph (b), the view was expressed that the term "mental harm" required further clarification.

62. Regarding article II, subparagraph (d), the view was expressed that the phrase "imposing measures intended to prevent births within the group" required further clarification and could be replaced by the phrase "preventing births within the group".

63. With regard to article II, subparagraph (e), the view was expressed that the provision concerning forcible transfers of children should be expanded to include persons who were members of a particular group.

(c) Ancillary crimes

64. Several delegations drew attention to the ancillary crimes addressed in article III of the Genocide Convention, with some delegations suggesting the inclusion of that provision in the definition of genocide and other delegations suggesting that those crimes should be addressed in a general provision in relation to the various crimes.

3. Aggression

(a) Inclusion

65. There were different views concerning the inclusion of aggression.

66. Some delegations were of the view that aggression should be included to avoid a significant gap in the jurisdiction of the Court, as aggression was one of the most serious crimes of concern to the entire international community, and that it should be regarded as a core crime under general international law; to create a deterrent and to avoid the impunity of the responsible individuals by providing a forum for their prosecution; to enhance the role and stature of the Court; to avoid any negative inference concerning individual criminal responsibility under customary law contrary to the Nürnberg Tribunal precedent affirmed by the General Assembly; and to avoid adopting a retrogressive statute 50 years after the Nürnberg and Tokyo tribunals and the adoption of the Charter of the United Nations.

67. Some delegations supported the inclusion of this crime if general agreement could be reached on its definition and on the appropriate balance of the respective roles and functions of the Court and the Security Council, without delaying the establishment of the Court.

68. Still other delegations were of the view that it should not be included because there was no generally accepted definition of aggression for the purpose of determining individual criminal responsibility; there was no precedent for individual criminal responsibility for acts of aggression in contrast to wars of aggression; it would be difficult and inappropriate to attempt to elaborate a sufficiently clear, precise and comprehensive definition of aggression; any attempt to elaborate a generally acceptable definition would substantially delay the establishment of the Court; the crime of aggression necessarily involved political and factual issues (such as territorial claims) that were inappropriate for adjudication by a criminal court; its inclusion could subject the Court to the struggle for political influence among States; the Court would still have jurisdiction over other crimes that often accompanied acts of

aggression; it would be difficult to achieve an appropriate relationship between the judicial functions of the Court and the political functions entrusted to the Security Council under the Charter of the United Nations (for a discussion of this issue and art. 23, see paras. 137-139 below); and its inclusion could jeopardize the general acceptance or universality of the Court.

69. Some delegations expressed support for providing a review mechanism under which aggression might be added at a later stage to avoid delaying the establishment of the Court pending the completion of a generally accepted definition. Other delegations were opposed to that view. The view was also expressed that appropriate language could be added to the preamble or an operative provision to avoid any negative inferences regarding individual criminal responsibility for such crimes under customary law. (See also the discussion of treaty-based crimes in paras. 103-115 below.)

(b) Definition

70. Several delegations noted the absence of a generally agreed definition of aggression for the purpose of determining individual criminal responsibility under treaty law. Reference was made to various relevant instruments, including Article 2, paragraph 4, of the Charter of the United Nations, the Nürnberg Tribunal Charter, the Tokyo Tribunal Charter, General Assembly resolution 3314 (XXIX) of 14 December 1974, the draft Code and the new definition therefor, and the Siracusa draft.

71. Some delegations were of the view that the Nürnberg Charter provided a precise definition of particularly serious offences resulting in individual criminal responsibility under customary law, while others described the definition contained therein as too imprecise for these purposes, or too restrictive or outdated.

72. Some delegations expressed the view that the General Assembly resolution provided a generally accepted definition of aggression and contained elements that could be included in the definition of this crime. Other delegations expressed the view that the resolution did not contain a definition for the purpose of individual criminal responsibility; or indicate the acts that were of sufficient gravity for this purpose; or address a number of fundamental issues that could arise in criminal proceedings, including questions relating to exceptional situations involving the lawful use of force; or deal with possible defences, including self-defence.

73. Some delegations suggested that it might be easier to reach agreement on a general definition of aggression similar to the new draft Code provision proposed by the ILC. Other delegations expressed a preference for a general definition accompanied by an enumeration of acts to ensure respect for the principle of legality and made reference to the General Assembly resolution and the Siracusa draft. Still other delegations believed it was not necessary to define aggression even if the Court had jurisdiction. Some delegations which had recommended that no definition of aggression should be included in the Statute proposed that a provision should be inserted which specified that, in accordance with the provisions of the Charter, the Security Council would determine whether or not a situation could be considered aggression. The role of the Court would then be to establish whether or not that situation had given rise to the commission of crimes involving individual responsibility. On the role of the Security Council in relation to the crime of aggression, some delegations pointed out the need to avoid a situation in which the use of the veto in the Council might preclude the prosecution of a person by the Court for the commission of such a crime.

4. Serious violations of the laws and customs applicable in armed conflict

(a) Inclusion

74. There was general agreement that serious violations of the laws and customs applicable in armed conflict could qualify for inclusion under the jurisdictional standard referred to in the second paragraph of the preamble.

75. Some delegations expressed the view that this category of crimes should be limited to exceptionally serious violations of international concern; to violations of fundamental protections or particularly serious acts which shocked the conscience of humanity; to situations in which national jurisdiction was unavailable or ineffective to ensure respect for the principle of complementarity and to avoid undermining the existing obligations of States to prosecute or extradite offenders; and to extremely serious situations in which the national courts refused, failed or were unable to exercise jurisdiction given the primary responsibility and interest of a State in maintaining military discipline.

76. Other delegations expressed the view that it was sufficient to refer to serious violations, that the reference to exceptionally serious violations could give rise to confusion regarding a third category of crimes especially regarding grave breaches, that grave breaches were by definition serious offences, that any attempt to distinguish between grave breaches would be inconsistent with the obligation to prosecute or extradite, that the seriousness criterion was more appropriate for distinguishing between violations of the laws and customs applicable in armed conflict which varied in gravity and that issues relating to national court jurisdiction should be addressed elsewhere.

77. There were proposals to include a seriousness criterion in the definition, to apply the criterion in listing the offences to obviate the need for a judicial determination or to include a general provision that would apply to all crimes.

(b) Character of the armed conflict

78. There were different views as to whether this category of crimes should include violations committed in international or non-international armed conflicts. Some delegations expressed the view that it was important to include violations committed in internal armed conflicts given their increasing frequency in recent years, that national criminal justice systems were less likely to be able to adequately address such violations and that individuals could be held criminally responsible for such violations as a matter of international law, with references being made to the Statute of the Rwanda Tribunal and the decision of the Yugoslavia Tribunal Appeals Chamber in the *Tadić* case. Other delegations expressed the view that violations committed in internal armed conflicts should not be included, that the inclusion of such violations was unrealistic and could undermine the universal or widespread acceptance of the Court, that individual criminal responsibility for such violations was not clearly established as a matter of existing law, with attention being drawn to the absence of criminal offence or enforcement provisions in Additional Protocol II, and that customary law had not changed in this respect since the Rwanda Tribunal Statute. Different views were also expressed concerning the direct applicability of the law of armed conflict to individuals in contrast to States.

(c) Definition

79. Reference was made to various relevant instruments, including the Nürnberg Tribunal Charter, the Yugoslavia Tribunal Statute, the Rwanda Tribunal Statute, the draft Code of Crimes and the new definition proposed by the ILC Special Rapporteur on the draft Code.

80. Several delegations expressed the view that grave breaches of the Geneva Conventions had attained the status of customary law and should be combined with other serious violations of the laws and customs applicable in armed conflict under subparagraph (c), with attention being drawn to the new definition proposed for the draft Code in contrast to the Yugoslavia Tribunal Statute and a proposal being made to amend the title of this category of crimes accordingly.

81. Several delegations expressed the view that the list of offences should include sufficiently serious violations of the Hague law, with references being made to the 1907 Hague Convention IV respecting the Laws and Customs of War on Land and its annexed regulations and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; grave breaches of the Geneva Conventions, with references also being made to common article 3 thereof and grave breaches of Additional Protocol I; and comparably serious violations of other relevant conventions that had attained the status of customary law. Different views were expressed concerning the customary law status of Additional Protocols I and II. There were proposals to incorporate provisions of the protocols without referring thereto and to add Additional Protocol II under article 20, subparagraph (e). The view was also expressed that Additional Protocol I had not so far secured the most widespread acceptance by the international community, which would be essential for the Protocol to qualify for inclusion in the statute.

5. Crimes against humanity

(a) Inclusion

82. There was general agreement that crimes against humanity met the jurisdictional standard referred to in the second paragraph of the preamble.

(b) Definition

83. Several delegations noted the absence of a generally accepted definition of crimes against humanity under treaty law. Reference was however made to such relevant instruments as the Nürnberg Tribunal Charter, Control Council Law Number 10, the Tokyo Tribunal Charter, the Yugoslavia Tribunal Statute, the Rwanda Tribunal Statute, the draft Code of Crimes against the Peace and Security of Mankind and the Siracusa draft. The view was also expressed that the definition of crimes against humanity should only be dealt with upon completion of the International Law Commission's work on the draft Code.

(c) General criteria

84. A number of delegations attributed particular importance to the general criteria for crimes against humanity to distinguish such crimes from ordinary crimes under national law and to avoid interference with national court jurisdiction with respect to the latter, with the discussion focusing primarily on the criteria contained in article 3 of the Rwanda Tribunal Statute.

(d) Widespread or systematic criteria

85. There was general support for the widespread or systematic criteria to indicate the scale and magnitude of the offences. The following were also mentioned as elements to be taken into account: an element of planning, policy, conspiracy or organization; a multiplicity of victims; acts of a certain duration rather than a temporary, exceptional or limited phenomenon; and acts committed as part of a policy, plan, conspiracy or a campaign rather than random, individual or isolated acts in contrast to war crimes. Some delegations expressed the view that this criterion could be further clarified by referring to widespread and systematic acts of international concern to indicate acts that were appropriate for international adjudication; acts committed on a massive scale to indicate a multiplicity of victims in contrast to ordinary crimes under national law; acts committed systematically or as part of a public policy against a segment of the civilian population; acts committed in application of a concerted plan to indicate the necessary degree of intent, concert or planning; acts committed with the consent of a Government or of a party in control of territory; and exceptionally serious crimes of international concern to exclude minor offences, as in article 20, paragraph (e). Some delegations expressed the view that the criteria should be cumulative rather than alternative.

(e) Attack against any civilian population

86. A number of delegations emphasized that crimes against humanity could be committed against any civilian population, in contrast to the traditional notion of war crimes. However, some delegations expressed the view that the phrase "attack against any civilian population" which appeared in the Rwanda Tribunal Statute was vague, unnecessary and confusing since the reference to attack could be interpreted as referring to situations involving an armed conflict and the term "civilian" was often used in international humanitarian law and was unnecessary in the current context. There were proposals to delete this phrase or to replace the word "attack" by the word "acts". However, the view was also expressed that the word "attack" was intended to indicate some use of force rather than an armed attack and a number of delegations believed that the phrase should be retained to avoid significantly changing the existing definition of these crimes.

(f) Motivation or grounds

87. There were different views concerning the general motivational requirement or grounds criterion contained in the Rwanda Tribunal Statute. The view was expressed that it would be useful to include these grounds to demonstrate the types of situations in which crimes against humanity were committed, as indicated by the recent events in the former Yugoslavia and in Rwanda which had led to the establishment of the ad hoc tribunals. However, other delegations expressed the view that the inclusion of such a criterion would complicate the task of the Prosecution by significantly increasing its burden of proof in requiring evidence of this subjective element; that crimes against humanity could be committed against other groups, including intellectuals and social, cultural or political groups; that it was important to include crimes against such groups since the definition of genocide might not be expanded to cover them; and that the criterion was not required under customary law, with attention being drawn to the Yugoslavia Tribunal Statute and the draft Code. There was a proposal to include a general reference to the commission of the crimes on discriminatory grounds.

(g) Nexus to armed conflict

88. There were different views as to whether it was necessary to include a nexus to an armed conflict which was not included in the Rwanda Tribunal Statute. Some delegations expressed the view that crimes against humanity were invariably committed in situations involving some type of armed conflict, as indicated by the ad hoc tribunals; that existing law required some type of connection to an armed conflict in a broad sense, with references being made to the Nürnberg Charter, the Yugoslavia Tribunal Statute, the memorandum of its President and the Nikolić case pending before it; and that customary law had not changed owing to the adoption of human rights instruments which provided specific procedures for addressing violations or the Rwanda Tribunal Statute.

89. However, several delegations expressed the view that crimes against humanity could occur in time of armed conflict or in time of peace and that the armed conflict nexus that appeared in the Nürnberg Tribunal Charter was no longer required under existing law, with attention being drawn to article I of the Genocide Convention, Control Council Law Number 10, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the Rwanda Tribunal Statute, the Yugoslavia Tribunal Appeals Chamber decision in the Tadić case and the draft Code. The view was also expressed that although crimes against humanity often occurred in situations involving armed conflict, these crimes could also occur in time of peace or in situations that were ambiguous.

90. The view was expressed that peacetime offences might require an additional international dimension or criterion to indicate the crimes that would be appropriate for adjudication by the Court, possibly by limiting the individuals who could commit such crimes. Some delegations questioned the need for an additional criterion assuming that sufficiently serious, grave or inhumane acts were committed on a widespread and systematic basis, with attention being drawn to proposals for clarifying this general criterion to indicate more clearly the offences that would be appropriate for international adjudication.

(h) List of acts

91. Several delegations expressed the view that the definition should include a list of exceptionally serious, grave or inhumane acts which shocked the conscience of humanity. Some delegations expressed the view that these acts could be drawn from the identical list contained in the Yugoslavia and Rwanda Tribunal statutes, with some delegations indicating provisions that might require further consideration or clarification.

(i) Murder

92. Some delegations expressed the view that murder required further clarification given the divergences in national criminal laws. There were proposals to refer to wilful killing or to murder, including killings done by knowingly creating conditions likely to cause death.

(ii) Extermination

93. The view was expressed that extermination should be deleted as a duplication of murder or clarified to distinguish between the two, with a proposal being made to refer to alternative offences.

(iii) Enslavement

94. Some delegations expressed the view that enslavement required further clarification based on the relevant legal instruments. There were proposals to refer to enslavement, including slavery-related practices and forced labour; or the establishment or maintenance over persons of a status of slavery, servitude or forced labour. The view was expressed that forced labour, if included, should be limited to clearly unacceptable acts.

(iv) Deportation

95. Some delegations expressed the view that deportation required further clarification to exclude lawful deportation under national and international law. There were proposals to refer to discriminatory and arbitrary deportation in violation of international legal norms; deportation targeting individuals as members of a particular ethnic group; deportation without due process of law; deportation or unlawful confinement of civilian population; or deportation resulting in death or serious bodily injury.

(v) Imprisonment

96. Some delegations expressed the view that this offence required further clarification to exclude lawful imprisonment in the exercise of State authority. There were proposals to refer to imprisonment in violation of due process or judicial guarantees; imprisonment in violation of international norms prohibiting arbitrary arrest and detention; and imprisonment resulting in death or serious bodily injury.

(vi) Torture

97. Some delegations expressed the view that this offence required further clarification. There was a proposal to incorporate relevant provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment without requiring that the acts be committed by a public official if the other general criteria were met. There was also a proposal to define this offence in terms of cruel treatment, including torture, and to add mutilation as a separate offence.

(vii) Rape

98. There were proposals to refer to rape committed on national or religious grounds; rape, other serious assaults of a sexual nature, such as forced impregnation; or outrages upon person dignity, in particular humiliating and degrading treatment, rape or enforced prostitution, with attention being drawn to recent acts committed as part of a campaign of ethnic cleansing.

(viii) Persecution on political, racial or religious grounds

99. Some delegations expressed the view that persecution should be further clarified and limited to the most egregious cases, while other delegations questioned whether it met the jurisdictional standard and whether it constituted a general policy criterion or a separate offence. These other delegations did not consider it appropriate to include persecution within the jurisdiction of the Court. There was a proposal to include persecution on political, racial, religious or cultural grounds. Reference was also made to the Siracusa draft.

(ix) Other inhumane acts

100. Some delegations favoured the inclusion of this category to cover similar acts that were not envisaged and might not be foreseeable; to enable the prosecution of individuals for similar inhumane acts that were not explicitly listed, as in the case of the Yugoslavia Tribunal; and to facilitate the expansion of the Court's jurisdiction in response to the continuing development of international law, with attention being drawn to similar language contained in various definitions of crimes against humanity and national criminal laws.

101. Other delegations expressed the view that this category should not be included as it would not provide the clarity and precision required by the principle of legality, would not provide the necessary certainty concerning the crimes that would be subject to international prosecution and adjudication, would not sufficiently guarantee the rights of the accused and would place an onerous burden on the Court to develop the law.

102. There were proposals to limit this category by interpreting it in the context of the definition as a whole, or by referring to other inhumane acts of a similar nature; or by referring to other similar inhumane acts accompanied by a description of their general characteristics and specific examples. There were also proposals to prepare an exhaustive list by adding similar acts that constituted serious violations of the laws and customs applicable in armed conflict or grave breaches of the Geneva Conventions, such as taking civilians as hostages, wilfully depriving a civilian of the right to a fair and regular trial, wilfully causing great suffering or serious injury to body or health and extensive destruction and appropriation of property carried out unlawfully and wantonly. The view was expressed that the double criminality of such acts would not be inconsistent with the principle of legality since the Court would decide the preponderant elements of an act in determining individual criminal responsibility. The view was also expressed that the Statute could provide an amendment or review procedure that would enable the States parties to the Statute to add other offences at a later stage.

6. Treaty-based crimes

(a) Inclusion

103. Several delegations expressed the view that the jurisdiction of the Court should be limited to the core crimes under general international law to avoid any question of individual criminal responsibility resulting from a State not being a party to the relevant legal instrument, to facilitate the acceptance of the jurisdiction of the Court by States that were not parties to particular treaties, to facilitate the functioning of the Court by obviating the need for complex State consent requirements or jurisdictional mechanisms for different categories of crimes, to avoid overburdening the limited financial and personnel resources of the Court or trivializing its role and functions, and to avoid jeopardizing the general acceptance of the Court or delaying its establishment.

104. Some delegations expressed support for including various treaty-based crimes which, having regard to the conduct alleged, constituted exceptionally serious crimes of international concern as envisaged in article 20, paragraph (e). The importance of the principle of complementarity was emphasized with respect to these crimes.

105. Some delegations favoured including a separate mechanism for referring exceptional cases where all the interested States concerned agreed. Such a

mechanism would involve a separate State consent regime from that applicable to crimes in respect of which universal jurisdiction already existed.

(b) International terrorism

106. A number of delegations were of the view that international terrorism qualified for inclusion under the jurisdictional standard referred to in the second paragraph of the preamble given the serious nature of such acts which shocked the conscience of humanity and the magnitude of the consequences thereof in terms of human suffering and property damage, the increasing frequency of international terrorist acts committed on an unprecedented scale, the resulting threat to international peace and security indicated by recent Security Council practice and the concern of the international community indicated by the condemnation of those crimes in numerous resolutions and declarations. The view was expressed that including those crimes in the Court's jurisdiction would strengthen the ability of the international community to combat those crimes, give States the option of referring cases to the Court in exceptional situations and avoid jurisdictional disputes between States. The view was also expressed that the Court might consider cases of international terrorism in exceptionally serious cases when the Security Council referred the question to the Court for its consideration. Some delegations also emphasized the importance of distinguishing between international terrorism and the right to self-determination, freedom and independence of peoples forcibly deprived of that right, particularly peoples under colonial and racist regimes or other forms of alien domination. References were made to the relevant treaties listed in the annex to the draft statute, the Declaration on Measures to Eliminate International Terrorism adopted by the General Assembly at its forty-ninth session 7/ and the draft Code. The view was expressed that it was precisely these crimes of international terrorism in respect of which national jurisdiction would in many cases not be available.

107. A number of other delegations were of the view that international terrorism should not be included because there was no general definition of the crime and elaborating such a definition would substantially delay the establishment of the Court; these crimes were often similar to common crimes under national law in contrast to the crimes listed in other subparagraphs of article 20; the inclusion of these crimes would impose a substantial burden on the Court and significantly increase its costs while detracting from the other core crimes; these crimes could be more effectively investigated and prosecuted by national authorities under existing international cooperation arrangements for reasons similar to those relating to illicit drug trafficking; and the inclusion of the crimes could lessen the resolve of States to conduct national investigations and prosecutions and politicize the functions of the Court.

(c) Apartheid

108. Some delegations favoured including apartheid and other forms of racial discrimination as defined in the relevant conventions.

(d) Torture

109. Some delegations expressed support for the inclusion of torture and referred to the definition contained in the relevant international legal instruments. The view was also expressed that torture was a crime under the domestic law of States and should not be included.

(e) Hostages

110. The view was expressed that the inclusion of the Hostages Convention must be considered.

(f) Illicit drug trafficking

111. Some delegations expressed the view that particularly serious drug trafficking offences which involved an international dimension should be included, that these offences had serious consequences on the world population and that there was no unified system for addressing these crimes because of divergences in national laws. Reference was made to the convention listed in the annex to the ILC draft statute as well as the new definition proposed by the ILC Special Rapporteur.

112. The view was expressed that drug trafficking should not be included because these crimes were not of the same nature as those listed in other paragraphs of article 20 and were of such a quantity as to flood the Court; the Court would not have the necessary resources to conduct the lengthy and complex investigations required to prosecute the crimes; the investigation of the crimes often involved highly sensitive information and confidential strategies; and the crimes could be more effectively investigated and prosecuted by national authorities under existing international cooperation arrangements.

(g) Attacks against United Nations and associated personnel

113. Some delegations expressed the view that special consideration should be given to including violations referred to in the Convention on the Safety of United Nations and Associated Personnel since they were undoubtedly exceptionally serious crimes of international concern; the attacks were committed against persons who represented the international community and protected its interests; the attacks were in effect directed or committed against the international community; United Nations and associated personnel were usually involved in situations in which the national law-enforcement or criminal justice system was not fully functional or capable of addressing these crimes; and the international community had a special responsibility to ensure the prosecution and punishment of these crimes. There were different views as to whether and to what extent these violations constituted crimes under general international law which could be included in the jurisdiction of the Court prior to the entry into force of the Convention.

(h) Serious threats to the environment

114. The view was expressed that the inclusion of serious threats to the environment must be considered.

(i) Review procedure

115. Some delegations favoured limiting the initial jurisdiction of the Court and including a review procedure for considering the addition of other crimes at a later stage to avoid delaying the establishment of the Court and to take account of the adoption or entry into force of relevant treaties in the future. A number of delegations presented a proposal to this effect. Others were not in favour of the inclusion of such a procedure since there was no point in delaying decision-making. There were different views concerning the effectiveness of review procedure clauses. The consideration of this question was described as premature. The view was expressed that treaties adopted after the establishment of the Court could include appropriate jurisdictional clauses similar to those relating to the International Court of Justice.

D. Trigger mechanism

116. The trigger mechanism touches upon two main clusters of issues: acceptance of the Court's jurisdiction, State consent requirements and the conditions for the exercise of jurisdiction (arts. 21 and 22); and who can trigger the system and the role of the Prosecutor (arts. 23 and 25).

1. Acceptance of the Court's jurisdiction, State consent requirements and the conditions for the exercise of jurisdiction: articles 21 and 22

117. Some delegations felt that the treatment of jurisdiction in articles 21 and 22 of the Statute was insufficient. In their view, the inherent jurisdiction of the Court should not be limited to genocide, but should extend to all the core crimes. Acceptance of inherent jurisdiction for the core crimes would require significant revision of articles 21 and 22. From this perspective, the Court would not need specific State consent to establish its jurisdiction. States, by virtue of becoming party to the Statute, would be consenting to its jurisdiction. This meaning of inherent jurisdiction, some delegations felt, was fully compatible with respect for State sovereignty, since States would have expressed their consent at the time of ratification of the Statute as opposed to having to express it in respect of every single crime listed in the Statute at different stages. Hence, there would be no need for a selective "opt in" or "opt out" approach. In accord with this view, the opening clause of article 21 should be changed to state that the Court should have jurisdiction over the crimes listed in article 20. Article 22 would become superfluous and should be deleted. It was, however, noted that if the Statute were to include crimes other than core crimes, the "opt in" regime could be maintained for them. In this regard, a remark was made that a distinction should be made between the jurisdiction of the Court per se and the exercise of that jurisdiction or the terms and conditions for the exercise of jurisdiction; these issues all linked to the question of admissibility under article 35. In this context, a comment was made that article 21 dealt with the conditions of the exercise of jurisdiction by the Court, by establishing the Court's jurisdiction ratione personae.

118. Some delegations found inherent jurisdiction to be a contradiction in terms, for the jurisdiction of the Court would arise exclusively out of the contractual stipulations in the instrument by which the Court would be created. They also found inherent jurisdiction incompatible with complementarity. Other delegations saw it differently. For them, the concept of inherent jurisdiction meant that the Court was invested with jurisdiction by virtue of its constituent instrument, with no need for additional consent to exercise its jurisdiction. Inherent jurisdiction also did not, in their view, imply that the Court, in all circumstances, had a better claim than national Courts to exercise jurisdiction. It was therefore possible that a case could arise in relation to a crime which was within the Court's inherent jurisdiction but which would none the less be tried by a national jurisdiction, because it was determined that the exercise of national jurisdiction would be more appropriate in that particular case.

119. Some other delegations expressed reservations about the inherent jurisdiction of the Court over any crime, including the core crimes. They believed that the regime of "opt in" provided for in article 22 was more likely to maximize universal participation. In their view, this approach was also consistent with the principle of sovereignty and the regimes set out by the treaties on the core crimes themselves. A comment was made that the "opt in" approach was compatible with the practice of adherence to the jurisdiction of the International Court of Justice. Similarly, in the current context, by

becoming party to the Statute of the Court, States did not automatically accept the jurisdiction of the Court in a particular case. This would be done by means of a declaration, in accordance with article 22 of the Statute.

120. Some delegations saw merit in having genocide come under the inherent jurisdiction of the Court. Reference was made to article VI of the Genocide Convention, which provides that persons accused of genocide should be tried by a competent tribunal or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction. However, a view was expressed that taking into account that the Genocide Convention contained provisions on national jurisdiction and that the number of States parties to it was less than 120, the inclusion of genocide as a crime within the so-called inherent jurisdiction of the Court would not only undermine the relevant provisions of the Genocide Convention on national jurisdiction, but would also run the risk of discouraging the non-States parties to that Convention from signing the Statute.

121. It was noted that the question of acceptance of the Court's jurisdiction was inextricably linked to the question of preconditions for the exercise of that jurisdiction, or consent, as well as to the question of who might bring complaints. In this connection, a comment was made that the jurisdiction of the Court, even under the core crimes approach, embraced different categories of crimes of different degrees of seriousness required for bringing charges. For example, the threshold for establishing genocide was rather high, compared to many war crimes which were not as high. However, not every single war crime was of sufficient serious international concern to warrant its submission to the Court.

122. Some delegations supported the requirement, set out in article 21 (1) (b), calling for the consent of the custodial State and the State where the crime was committed. In their view, such a consent requirement was essential, since the Court could not function without the cooperation of these States. A comment was made that custody over a suspect, however, should be in accordance with international law; the maxim male captus, bene detentus should have no application to the jurisdiction of the Court. It was further stated that, as a general rule, the number of States whose consent was required should be kept to the minimum. Otherwise, the likelihood of one of these States not being party to the Statute would increase, precluding the Court from initiating proceedings.

123. The remark was made that the word "custody" in article 21 (1) (b) (i) was misleading, for it appeared to include mere presence, even a transitory presence. This was inconsistent with current State practice, according to which an accused is normally located in or extradited to the State in which he or she committed the crime. Furthermore, in current State practice, the potential for political abuse was controlled in a number of ways, including comity and diplomatic immunity. In contrast, the current draft, according to this view, left open significant possibilities for efforts by States to embroil the Court in legal controversies and political disputes, which could undermine its effectiveness.

124. In addition, it was noted that the actual location of the accused was not important at the initial stage of the proceedings, but only at the stage of arrest. Hence, the role of the custodial State should be addressed in connection with the obligation to cooperate with the Court, and not in connection with jurisdiction. Even in that context, it sufficed, according to this view, for the custodial State to be party to the Statute; it was not necessary for it to have accepted a particular type of jurisdiction.

125. A view was expressed that the precondition to the exercise of the Court's jurisdiction imposed by article 21 (1) (b) (i) was not consistent with subsequent provisions in the Statute, namely those that allowed the Court to confirm an indictment against a person who was not detained, and with article 53 (2) (b) and (c).

126. As regards the requirement of consent of the State where the crime was committed, a comment was made suggesting modifying the language of article 21 (1) (b) (ii) by means of the addition of the words "if applicable" in order to cover situations where the crime might have been committed outside the territory of any State, such as on the high seas.

127. It was also stated that in certain types of conflict, in order to determine the States whose consent were necessary for the proceedings of the Court, one should look at the whole situation and not just the State where the crime was committed. The example given was war crimes, where at least two States would have interests in the case and the State where the war crime had been committed could be the one that started the war in violation of international law. Going beyond the core crimes, to terrorism, for example, it was noted that there would be other States, such as the one which was the target of the crime, with a real interest in the proceedings, yet whose interests were not taken into account by the current draft. It was further stated that a large number of States were precluded by their domestic law from extraditing their nationals for criminal prosecution abroad. The view was also expressed that the consent of the State of nationality of the accused to the jurisdiction of the Court should also be a precondition to the exercise of that jurisdiction. The reasons for that suggestion are set out in paragraph 105 of the report of the Ad Hoc Committee on the establishment of an International Criminal Court. 8/ Alternatively, the State of nationality of the suspect would have to extradite only if it refused to commence prosecution, in good faith, within a reasonable period of time. This approach, according to this view, was compatible with the principle of universal jurisdiction and should be taken into account in the Statute.

128. It was also noted that the Court could not exercise jurisdiction in relation to States not party to the Statute. This, it was agreed, could become a particularly difficult issue when the State not party was the custodial State or its cooperation was indispensable to the prosecution. For this reason, some delegations were of the view that it would be proper for the Security Council to have a role which was respectful of the independence of the Court in humanitarian situations.

2. Who can trigger the system and the role of the Prosecutor: articles 23 and 25

(a) The Security Council: article 23

129. Delegates in their comments appeared to agree that the Statute would not affect the role of the Security Council as prescribed in the Charter of the United Nations. The Council would, therefore, continue to exercise primary authority to determine and respond to threats to and breaches of the peace and to acts of aggression; the obligation of Member States to accept and carry out the decisions of the Council under Article 25 of the Charter would remain unchanged. However, some delegations voiced three concerns: first, that it was important, in the design of the Statute, to ensure that the international system of dispute resolution - and in particular the role of the Security Council - would not be undermined; secondly, that the Statute should not confer any more authority on the Security Council than that already assigned to it by the Charter; and thirdly, that the relationship between the Court and the Council

should not undermine the judicial independence and integrity of the Court or the sovereign equality of States.

130. In the light of the above concerns, some delegations found that article 23 was completely unacceptable and should be deleted. Others felt it was in need of substantial revision precisely because it conferred more authority on the Security Council than did the Charter or than was necessary in contemporary international relations; it also diminished the requisite judicial independence of the Court. In their view, the Security Council was a political organ whose primary concern was the maintenance of peace and security, resolving disputes between States and having sufficient effective power to implement its decisions. The Council made its decisions, according to these delegations, taking into account political considerations. The Court, in contrast, was a judicial body, concerned only with the criminal responsibility of individuals who committed serious crimes deeply offensive to any moral sense.

131. Some other delegations, however, favoured the proposed article 23 of the Statute. In their view, the article corresponded with the role for the Security Council carved out in the Charter and properly took account of the current situation of international relations. They did not agree with the view that decisions of the Security Council were exclusively political in nature. They were convinced that, while it was a political organ, the Security Council made decisions in accordance with the Charter of the United Nations and international law and that these decisions, in particular those adopted under Chapter VII of the Charter, had legal or political-legal character. On the contrary, according to this view, it was more likely for a State to lodge a complaint with the Court inspired purely by political motives.

(i) Article 23 (1)

132. Some delegations requested the deletion of article 23 (1), empowering the Security Council to refer a "matter" to the Court. Others favoured its retention. For the former delegations, a referral by the Security Council would affect the independence of the Court in the administration of justice. Delegations holding this view believed that a political body should not determine whether a judicial body should act. In addition, referral by the Security Council would dispense with the requirements of article 21 as well as complementarity and the sovereign equality of States. It was further noted that article 23 (1) assigned the right of referral of a matter to the Court only to the Security Council. Taking into account current efforts to define the new world order, in which the relationship between the Security Council and the General Assembly had come under scrutiny, these delegations wondered if such right should also be conferred upon the General Assembly.

133. Those delegations favouring the retention of article 23 (1) based their views on the following: the Security Council had already demonstrated a capacity to address the core humanitarian law crimes through the creation of two ad hoc tribunals, for the former Yugoslavia and for Rwanda, and had created the International Commission of Inquiry in Burundi to report on violations of international humanitarian law; one of the purposes of the Court was to obviate the creation of ad hoc tribunals. In this context, the Council's referral should activate a mandatory jurisdiction, similar to the powers of the ad hoc tribunals. The Council's referral would not, according to these delegations, impair the independence of the Court because the Prosecutor would be free to decide whether there was sufficient evidence to indict a particular individual for a crime.

134. It was also noted that article 23 (1) limited the Security Council's referral authority to Chapter VII situations. Some delegations proposed that the Council's referral authority should be extended to matters under Chapter VI as well. They mentioned Articles 33 and 36 of the Charter, which encourage Council action of a peaceful character with respect to any dispute, the continuance of which was likely to endanger the maintenance of international peace and security. One of the "appropriate procedures" described, it was noted, was "judicial settlement". Those pressing this point suggested deleting "Chapter VII of" from article 23 (1) so that Chapter VI actions would also be covered. Some other delegations did not favour the extension of the Council's right of referral to Chapter VI, while some other delegations reserved their position on this issue.

135. It was suggested that the effective functioning of the Court could be enhanced without interfering with the primary responsibility of the Security Council for the maintenance of international peace and security by allowing the Court to investigate or prosecute a case unless the Security Council directed otherwise.

136. As regards the use of the word "matter" in article 23 (1), a suggestion was made to replace it with "case". The suggestion was also made to provide that any referral should be accompanied by such supporting documentation as was available to the Security Council. This modification of article 23, according to the latter suggestion, would impose on the Council the same burdens and responsibilities imposed on a complainant State. A number of delegations, while not disagreeing with the latter, did not agree with the proposal to change the word "matter" to "case". They held the view that the Council, while having the power to refer a situation to the Court, should not be able to refer an individual to the Court. The word "situation" was however considered too broad by some delegations.

(ii) Article 23 (2)

137. With respect to the requirement of article 23 (2) that the Security Council should have determined that an act of aggression had already been committed before the Court could process complaints on individual responsibility for an act of aggression, two different views were expressed. According to one view, the paragraph should be retained if aggression was going to be included in the list of crimes in the Statute. According to another view, paragraph 2 should be deleted even if aggression was included in the list of crimes in the Statute. Some delegations reserved their position pending a final decision on the inclusion of aggression in the list of crimes.

138. A number of delegations recalled their opposition to the inclusion of the crime of aggression in the list of crimes in the Statute (for their views, see para. 68 above) and observed that if aggression were excluded from the list of crimes, there would be no need to maintain article 23 (2). But article 23 (2) would be indispensable if aggression were included in the list. They referred to Article 39 of the Charter, according to which the Security Council has the exclusive power to determine whether an act of aggression has been committed. In their view, it was difficult to see how an individual could be charged with an act of aggression - assuming a definition for individual culpability were agreed upon - without the threshold requirement of an act of aggression first being determined by the Security Council.

139. Delegations that favoured the deletion of article 23 (2), while supporting the retention of aggression as a crime under the Statute, based their view on the following grounds. First, in practice, the Security Council often responded to situations under Chapter VII of the Charter without explicitly determining

the existence of an act of aggression; requiring such a determination for the exercise of jurisdiction by the Court could impede the effective functioning of the Court. Secondly, because of the veto power, the Council might be unable to characterize an act as aggression. Thirdly, the Council's determination of an act of aggression was based on political considerations, while the Court would have to establish criminal culpability on legal grounds. In this connection and to protect the prerogatives of the Council, it was suggested that a provision should be included to the effect that the Statute was without prejudice to the functions of the Security Council under Chapter VII. However, a view was expressed that the determination by the Security Council on the existence of an act of aggression should be binding on the deliberations of the Court. Yet another view was expressed that article 23 (2) could remain in place if supplemented by a provision clarifying that the decisions by the Security Council on the commission of an act of aggression by a State was not binding on the Court as regards the question of individual responsibility.

(iii) Article 23 (3)

140. As regards article 23 (3), providing that no prosecution may be commenced arising from a situation being dealt with by the Security Council in accordance with Chapter VII unless the Council otherwise decides, a number of different views were expressed.

141. According to one view, the necessity for the retention of the paragraph arose from the fact that the Security Council had the primary responsibility for the maintenance of international peace and security. Delegations expressing this view thought it would be unacceptable if the Court were empowered to act in defiance of the Charter of the United Nations and to interfere in delicate matters under consideration by the Security Council. According to this view, paragraph 3 should be revised to include, not only Chapter VII situations, but all situations which were being dealt with by the Council.

142. According to another view, because paragraph 3 was designed to function as the political equivalent of the sub judice rule, its ambit was so wide as to infringe on the judicial independence of the Court. Reference was made to the large number of situations currently under consideration by the Security Council and the fact that in many cases the Security Council had been "seized" of these same situations continuously for more than 30 years without taking effective action. It was noted that, under paragraph 3, the Council would have the authority to preclude the Court from examining any complaint in respect of them. It was further noted that the Statute of the International Court of Justice did not prevent the Court from hearing cases relating to international peace and security which were being dealt with concurrently by the Security Council. According to this view, paragraph 3 should therefore be deleted.

143. Yet another view, while concerned about the implication of paragraph 3 for the judicial independence of the Court, found some ground for a safeguard clause, but not as currently formulated. According to this view, the words "being dealt with" should be narrowly defined to limit their scope. A narrow interpretation of these words was found compatible with the intention of the Commission as explained in its commentary to the paragraph, which interpreted it to mean "a situation in respect of which Chapter VII action is actually being taken" by the Security Council. Even this interpretation, according to this view, left many questions unresolved; for example, the words "threat to or breach of the peace" were open to broad interpretation and could conceivably cover all cases likely to fall within the Court's jurisdiction. Considering that national Courts could prosecute a case relating to a situation under consideration by the Security Council, the reasonableness of denying the Court the same power as national Courts was questioned. It was proposed to include a

provision stating that "should no action be taken in relation to a situation which has been referred to the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter within a reasonable time, the Court shall exercise its jurisdiction in respect of that situation". The purpose of this proposal was to allow the Court to take action in situations where the Security Council, though seized of a matter, would not or could not act upon it. A suggestion was also made to change the emphasis in the paragraph, by allowing the Court to proceed with a complaint unless the Security Council took a formal decision in accordance with Article 27 of the Charter to ask the Court not to proceed on the basis that the Council was taking effective action in relation to that situation or a matter referred to the Council as a threat to or breach of the peace. This would avoid the veto being available in respect of the Court's jurisdiction.

144. Concern was voiced about the possibility of conflict between decisions by the Court and the Security Council on the same issue. There was a feeling that those concerns were not adequately dealt with in the current wording of article 23.

(b) States: article 25

145. It was observed that the complaint mechanism set out in article 25 was premised on the right of any State party, under certain conditions, to lodge a complaint with the Prosecutor alleging that a crime "appears to have been committed". Some delegations found this arrangement satisfactory. Others, for different reasons, felt that it needed substantial modification.

146. Some delegations were uneasy with a regime that allowed any State party to select individual suspects and lodge complaints with the Prosecutor with respect to them, for this could encourage politicization of the complaint procedure. Instead, according to these delegations, States parties should be empowered to refer "situations" to the Prosecutor in a manner similar to the way provided for the Security Council in article 23 (1). Once a situation was referred to the Prosecutor, it was noted, he or she could initiate a case against an individual. It was suggested, however, that in certain circumstances a referral of a situation to the Prosecutor might point to particular individuals as likely targets for investigation.

147. Some delegations felt that only those States parties to the Statute with an interest in the case should be able to lodge a complaint. Interested States were identified as the custodial State, the State where the crime was committed, the State of nationality of the suspect, the State whose nationals were victims and the State which was the target of the crime. Some other delegations opined that the crimes under the Statute were, by their nature, of concern to the international community as a whole. They also noted that the jurisdiction of the Court would only be engaged if some Government failed to fulfil its obligations to prosecute an international crime; then, in their view, all States parties would become interested parties. Some delegations felt that articles 34, 35 and 36 of the Statute provided adequate safeguards against abuse. In addition to preventing political abuse of the process, they suggested that the Prosecutor should notify all other States parties to the Statute, allowing them the opportunity to express their views on whether to proceed with the case before the Court decided. Some delegations proposed that one could require more than one State to lodge a complaint in order to signify that a serious crime of interest to the international community was at issue.

148. Some other delegations were of the view that the States which could lodge a complaint not only should be party to the Statute, but should also have accepted the Court's jurisdiction in respect of the specific crime for which the State

had made a complaint. In this respect, it was noted that for the crime of genocide a complaint could be made to the Court by a State party to the Genocide Convention but not party to the Statute. In other words, the acceptance requirements of articles 21 (1) and 25 (2) would be circumvented.

(c) The Prosecutor

149. Some delegations found the role of the Prosecutor, under article 25, too restricted. In their view, States or the Security Council, for a variety of political reasons, would be unlikely to lodge a complaint. The Prosecutor should therefore be empowered to initiate investigations ex officio or on the basis of information obtained from any source. It was noted that the Prosecutors of the two existing ad hoc tribunals were granted such rights; there was no reason to deny the same power to the Prosecutor of this Court. Hence the suggestion to add a new paragraph to article 25 along the lines of article 18 (1) of the Statute of the Tribunal for the former Yugoslavia and article 17 (1) of the Statute of the Tribunal for Rwanda. Under this system, therefore, individuals would also be able to lodge complaints.

150. In order to prevent any abuse of the process by any of the triggering parties, a procedure was proposed requiring that in case a complaint was lodged by a State or an individual or initiated by the Prosecutor, the Prosecutor would first have to satisfy himself or herself that a prima facie case against an individual obtained and the requirements of admissibility had been satisfied. The Prosecutor would then have to present the matter to a chamber of the Court (which would not ultimately try the case) and inform all interested States so that they would have the opportunity to participate in the proceedings. In this respect the indictment chamber was considered as the appropriate chamber. The chamber, upon a hearing, would decide whether the matter should be pursued by the Prosecutor or the case should be dropped. Up to this point, the procedure would be in camera and confidential, thus preventing any publicity about the case and protecting the interest of the States.

151. Some other delegations could not agree with the notion of an independent power for the Prosecutor to institute a proceedings before the Court. In their view, such an independent power would lead to politicization of the Court and allegations that the Prosecutor had acted for political motives. This would undermine the credibility of the Court. This power could also lead to overwhelming the limited resources of the Prosecutor with frivolous complaints. A view was expressed that the complaint lodged by the Prosecutor on his or her own initiative lacking the support of the complainant State would be ineffective. A view was further expressed that developments in international law had yet to reach a stage where the international community as a whole was prepared to empower the Prosecutor to initiate investigations. It was unrealistic to seek to expand the Prosecutor's role, according to this view, if widespread acceptance of the Court was to be achieved.

(d) Other comments

152. Two other comments were made in respect of article 25. First, preconditions to the exercise of jurisdiction should be looked at and satisfied at the very beginning and before the stage of investigation, lest the Court invest substantial resources only to discover that it could not exercise jurisdiction. Secondly, some delegations felt that article 25 on complaint was too complicated and would make the exercise of the jurisdiction of the Court unpredictable.

E. Complementarity

1. General comments

153. It was observed that complementarity, as referred to in the third paragraph of the preamble to the draft statute, was to reflect the jurisdictional relationship between the International Criminal Court and national authorities, including national courts. It was generally agreed that a proper balance between the two was crucial in drafting a statute that would be acceptable to a large number of States. Different views were expressed on how, where, to what extent and with what emphasis complementarity should be reflected in the statute.

154. Some delegations felt that complementarity should more explicitly reflect the intention of the Commission, in respect of the role of an international criminal court, in order to provide clear guidance for interpretation. That intention was for such a court to operate in cases where there was no prospect of persons who had been accused of the crimes listed in the statute being duly tried in national courts; but such a court was not intended to exclude the existing jurisdiction of national courts or to affect the right of States to seek extradition and other forms of international judicial assistance under existing arrangements. The Commission's intention, it was further noted, applied not only to national decisions as to whether or not to prosecute, but also to decisions by national authorities to seek assistance, including extradition, from another State and decisions by such other State to cooperate accordingly, particularly where that State was under an international obligation to do so. In this regard, therefore, complementarity becomes a constant in the arrangements for the Court and needs to be taken into account at each point at which the respective roles of the Court and national authorities can or do coincide. From this perspective, it is not a question of the Court having primary or even concurrent jurisdiction. Rather, its jurisdiction should be understood as having an exceptional character. There may be instances where the Court could obtain jurisdiction quickly over a case because no good-faith effort was under way at the national level to investigate or prosecute the case, or no credible national justice system even existed to consider the case. But as long as the relevant national system was investigating or prosecuting a case in good faith, according to this view, the Court's jurisdiction should not come into operation. A view was also expressed that a possible safeguard against sham trials could also be for the Statute to set out certain basic conditions relating to investigations, trials and the handling of requests for extradition and legal assistance.

155. It was also observed that the limited resources of the Court should not be exhausted by taking up the prosecution of cases which could easily and effectively be dealt with by national courts. In addition, taking into account that under international law, exercise of police power and penal law is a prerogative of States, the jurisdiction of the Court should be viewed only as an exception to such State prerogative.

156. Some delegations expressed the view that the establishment of the Court did not by any means diminish the responsibility of States to investigate vigorously and prosecute criminal cases. Therefore, they wanted the preamble of the Statute to reiterate the obligation of States in this respect. Caution, however, was voiced against placing such a paragraph in the preamble because it might tilt the bias in favour of national jurisdiction in interpreting complementarity. According to this view, the establishment of such a court was itself a manifestation of States exercising their obligations to prosecute vigorously perpetrators of serious crimes.

157. Some other delegations expressed concern that without specifying clear exceptions to the concept, complementarity would render the Court meaningless by undermining its authority. In their view, a suggestion that in each and every case the Prosecutor had to prove that circumstances required the Court's intervention would reduce it to a mere residual institution, short of necessary status and independence. In this context it was noted that while national authorities and courts had the primary responsibility for prosecuting the perpetrators of the crimes listed in the Statute, the Court was an indispensable asset in enhancing the prevention of impunity, which too often had been the reward for violators of human rights and humanitarian law. While attempts should be made to minimize the risk of the Court dealing with a matter that could eventually be dealt with adequately on the national level, it was, according to this view, still preferable to the risk of perpetrators of serious crimes being protected by sympathetic national judiciaries or authorities. In addition, a concern was raised that complementarity should not be used to uphold the sanctity of national courts. Such an approach would shift the emphasis from what the Court could do to what the Court should not do. Some delegations proposed the inclusion of a reference to complementarity in article 1; the proposal received some support.

158. The remark was also made that complementarity was closer to the concept of concurrent jurisdiction. The jurisdiction of the Court, it was stated, should be looked at in different contexts. While for certain crimes the Court would have inherent jurisdiction, the primary jurisdiction of national courts would be more appropriate for other crimes. The remark was further made that in respect of core crimes, there would always be a "perception" problem: it would be difficult to believe that national courts could be fair and impartial. For other types of crimes, such as terrorism, drug trafficking, etc., this would not be a problem. In addition, it was noted that, in cases of inherent jurisdiction, complementarity should not be construed so as to make the Court's jurisdiction dependent on factors beyond the Court's control. However, it was noted, even in respect of core crimes, the important role of national courts should not be undermined. Reference was made to the recent practice with respect to the establishment of ad hoc tribunals whereby the tribunals exercised inherent and primary jurisdiction over certain individual cases, with some deference to national justice systems as they currently existed.

159. It was suggested that the principle of complementarity should be defined as an element of the competence of the Court; the conditions, timing and procedures for invoking this principle should be clearly indicated; the person named in the submission to the Court or the State party invoking this principle should provide supporting information; the Court could hold a hearing before reaching a decision; the Prosecutor should be able to obtain protective measures to preserve evidence or to detain suspects pending the Court's decision; and the person named in the request for transfer or the State requested to transfer an accused should be able to invoke the principle for the first time before the trial.

160. It was further suggested that consideration should be given to how the complementarity regime would take account of national reconciliation initiatives entailing legitimate offers of amnesty or internationally structured peace processes.

2. Third preambular paragraph

161. A number of delegations agreed that while the preambular reference to complementarity should remain, a more explicit definition of the concept, enumerating its constituent elements, should also be embodied in an article of

the Statute. In this context it was noted that the words "unavailable" or "ineffective" should be further defined; it was also suggested that the words should be omitted altogether. Suggestions were also made to replace the words "trial procedures" with "systems" for further clarity. It was noted that while the determination of "availability" of national criminal systems was more factual, the determination of whether such a system was "ineffective" was too subjective. Such a determination would place the Court in the position of passing judgement on the penal system of a State. That would impinge on the sovereignty of national legal systems and might be embarrassing to that State to the extent that it might impede its eventual cooperation with the Court.

162. As regards who is to decide on whether the Court should exercise jurisdiction, three views emerged. According to one view, taking into account that the exercise of penal jurisdiction was the prerogative of States, the Court's jurisdiction was an exception to be exercised only by State consent. An optional clause regime, according to this view, was consistent with this approach. According to another view, the Court itself should make the final determination of jurisdiction, but in accordance with precise criteria set out in the Statute. According to yet a third view, while agreeing that the Court should decide on its own jurisdiction in accordance with the Statute, the Statute should leave some discretion to the Court.

163. It was recommended that the consequences of a State's refusal to consent to the Court's jurisdiction, if required by the Statute, should also be examined. The question would be whether, in such cases, the State would entail such responsibility as existed in the classical international law of State responsibility, or whether different consequences would ensue which should be specified in the Statute itself.

3. Article 35

164. It was noted that the principle of complementarity involved, besides the third preambular paragraph, a number of articles of the Statute, central among which was article 35 on admissibility. Several delegations felt that the three grounds indicated in that article, on the basis of which the Court may decide that a case before it is inadmissible, seemed too narrow. Paragraph (a) refers, for example, only to decisions of a State not to proceed to a prosecution, ignoring other national decisions to discontinue the proceedings, acquit, convict of a lesser offence, sentence or pardon or even requests for mutual assistance or extradition. Moreover, it was observed that other grounds of inadmissibility contained in other articles of the Statute (for example articles 42 and 55) could be included in article 35, which would then constitute the main article on complementarity in the operative part of the Statute. The view was expressed that the article should be expanded to include cases which are being or have been prosecuted before national jurisdictions, subject to qualifications in respect of impartiality, diligent prosecution, etc. It was further noted that the Court should abstain from exercising jurisdiction unless no domestic court was properly fulfilling this responsibility.

165. It was observed that paragraph (b) of article 35 indicated a crime under investigation as a ground for inadmissibility without taking into account the circumstances under which a crime was investigated and the possibilities of ineffective or unavailable procedures or even sham trials. A view was expressed that allowance should be made for parallel investigations to be conducted by national authorities and the Court under certain circumstances, as for example when an interested State did not object for the Court to investigate other aspects of the same conflict. It was generally agreed that "parallel" procedures between national courts and the Court should be avoided to the extent

possible. The necessity of additional procedural checks and review was also stressed, particularly in cases where the procedure of article 36 was applicable.

166. Other delegations recalled once again the difficulties in assessing when procedures were ineffective and pointed out the essentially subjective character of the proposed criteria. It was felt that more stringent and objective criteria, possibly included in the text of the Statute itself, would be needed for the purposes of greater clarity and security. The efficiency of national proceedings (as juxtaposed to the intention to "shield" the accused) was one such criterion: several delegations noted that notions such as "absence of good faith" and "unconscionable delay" in the conduct of the proceeding on the part of national authorities would be useful tools for the clarification of this issue. However, other delegations felt that these terms were also vague and might be confusing.

167. On the subject of who might raise the issue of inadmissibility, the question was raised as to whether the accused should be permitted to file an application or this right should rest only with "interested States". It was noted, however, that the notion "interested States" should be further defined. In this context several suggestions were made, notably mentioning the State of which the accused is a national, the State(s) of which the victim or victims are nationals, the State which has custody of the accused, the State on the territory of which the alleged crime was committed (State of locus delicti) or any other State which could exercise jurisdiction in respect of the crime. It was also pointed out that in such a case, article 36 would have to be modified to include any "interested State" in this sense. Other delegations noted that any State could have the right to file such a request. A view was also expressed that the accused could bring a challenge only after indictment and only on specific grounds.

168. As for the time of raising the issue of admissibility, it was generally agreed that it should be prior to, or at the beginning of the trial and not later. The view was expressed that the Court should be able to declare, at any time and of its own motion, or upon the request of the accused, a case inadmissible. In this respect, it was also noted that the Court should retain the right to recommence proceedings after a fundamental change of circumstances, or to review its own decision on the admissibility of a case.

169. Concerning the non-gravity of the crime as a ground for inadmissibility, it was pointed out that the inclusion of a more detailed definition of crimes in article 20 would suffice to indicate that the crime did not pertain to the jurisdiction of the Court as defined in that article.

4. Article 42

170. As regards article 42, the remark was made that the principle of non bis in idem was closely linked with the issue of complementarity. This paragraph, it was noted, should apply only to res judicata and not to proceedings discontinued for technical reasons. In addition, non bis in idem should not be construed in such a way as to permit criminals to escape any procedure.

171. Some delegations felt that the term "ordinary crime" in paragraph 2 (a) of article 42 needed further clarification. Some others thought that the term was sufficiently clear and should be retained. Yet some other delegations considered that it could be left out altogether since it might create a certain confusion. In this connection, it was mentioned that the principle

non bis in idem could apply when a person had already been tried for only a part of a crime. The view was also expressed that it was the nature of the crimes that was significant and this should be taken into consideration for the distinction between "ordinary crimes" and "other crimes" falling under the jurisdiction of the Court. It was suggested that a formulation to the effect that the national proceedings did not take account of the international character and the grave nature of the act might be useful.

172. With regard to the other precondition for the Court to try a person already tried in another court, indicated in paragraph 2 (b) of article 42, many delegations voiced their concern about the vagueness and the subjectivity of the criteria. It was pointed out that several core crimes could not effectively be tried in national courts because of their very nature and the circumstances of their commission. Several delegations felt that this wording would grant the Court an excessive right of control over national jurisdictions and would even undermine the principle of complementarity. According to this view, the Court should not be considered as an appellate court. However, several other delegations considered the article as drafted by the Commission sufficiently clear and comprehensive.

173. A view was also expressed that article 42 should include cases where the sentence imposed by the national jurisdiction was manifestly inadequate for the offence as an exception to non bis in idem. It was noted, however, that a possible solution would provide for the Court to try a person already tried in another court, only if the proceedings in the other court manifestly intended to shield the accused from his/her international criminal responsibility.

174. The view was also expressed that the "exception" to the principle non bis in idem as set out in article 42 (b) should extend beyond the trial proceedings to embrace parole, pardon, amnesty, etc. Others pointed out that the conditions and modalities laid down in article 35 should also apply to article 42. It was also noted that both articles 35 and 42 could be consolidated in order to constitute a unique central article on complementarity in the operative part of the Statute. A question was raised as to the possibility of a preliminary hearing on the question of admissibility between any interested State and the Court. The view was further expressed that article 42 (b) should not include any wording which could be conducive to subjective interpretation.

5. Article 27

175. It was noted that the decision of the Prosecutor not to prosecute should be subject to subsequent revision if, for example, new evidence appeared or a new complaint was lodged by a State. The view was also expressed that the Prosecutor should examine ex officio, on receiving a complaint, the question of the inadmissibility of the case.

176. Moreover, in a case where the Prosecutor defers investigation since a State is proceeding with a national investigation, a mechanism of mutual information between the Prosecutor, the investigating and the complainant States should be established. This mechanism would allow for the complainant State to lodge further complaints with the Court, should the third State's investigation be inadequate. The view was also expressed that in such a case a new complaint would not be required. In the same context, other delegations expressed their concern with regard to the powers of the Prosecutor to conduct investigations under article 26 and the possibility that they might be in conflict with domestic judicial procedures. 9/ According to a number of delegations, however,

the provisions of articles 26 and 27 adequately reflected the issue of complementarity and avoided the risk of "double jeopardy".

6. Article 51

177. As concerns article 51, which imposes an obligation on States to cooperate with the Court in connection with its investigations and proceedings, it was observed that this obligation should be confined to cases which are not inadmissible. Other delegations felt that the obligation should not be limited but should embrace all aspects of cooperation, even for the determination of grounds of inadmissibility.

7. Article 53

178. A view was expressed that paragraph 4 of article 53, which gives priority to court requests among possibly completing extradition obligations, should be deleted in the context of a strict application of complementarity. However, under another view it was pointed out that the provision was satisfactory and did not really affect complementarity insofar as a case had not been declared inadmissible.

F. General principles of criminal law

179. The discussion of the Preparatory Committee followed the guidelines set out in annex II to the report of the Ad Hoc Committee on the Establishment of an International Criminal Court 10/ on the question of the general principles of criminal law.

1. Process issues

(a) Methods of elaboration

180. There was broad agreement that the fundamental principles of criminal law to be applied to the crimes punishable under the Statute should be clearly laid down in the Statute in accordance with the principle of legality, nullum crimen sine lege, nulla poena sine lege. It was noted that conventions defining international crimes provided only one aspect of the substantive criminal law; they usually did not contain principles of liability and defence and other general rules of criminal law to be used to apply the definitions of crimes. It was considered important, therefore, that all general elements of crimes and the basic principles of liability and defence should be elaborated by States and laid down in the Statute itself, or in an annex thereto which would have the same legal value as the Statute. Suggestions were also made that punishment to be imposed on each offence, including the enforcement of penalties, should be elaborated in the Statute. The view was widely shared that the elaboration of those essential elements and principles, if left to the Court to deal with on a case-by-case basis, would not ensure predictability or equality before and in the law. Some delegations, however, suggested that technical and detailed rules should be developed by judges of the Court and incorporated in the rules of the Court, subject to the approval of the States parties to the Statute.

181. The articulation of the fundamental principles of criminal law in the Statute was considered consistent with the prerogative of legislative powers of sovereign States. It would give potential States parties a clear understanding

of the obligations entailed. It would also provide clear guidance to the Court and promote consistent jurisprudence. Furthermore, it would ensure predictability and certainty in the application of law, which would be essential for the protection of the rights of the accused.

182. Several delegations, however, cautioned against the risk of compounding the Statute with extensive and detailed rules. The goal, it was said, should not be to replicate an exhaustive criminal code in the Statute. It was recognized that the Statute could not specify all rules, nor could it predict all types of issues which might come before the Court. It was suggested, therefore, that a proper balance must be struck between the Statute laying down basic rules of applicable law and the rules of the Court supplementing and further elaborating those basic rules for the effective functioning of the Court. In this connection, it was also suggested that account be taken of the fact that the jurisdiction of the Court might be limited only to certain core crimes, and that the role of the Court would be complementary to that of national courts when addressing the issues of the Statute or the rules, or the application by the Court of general principles of criminal law.

183. It was emphasized by some delegations that the concept of an international criminal court with universal jurisdiction would be sustainable only on the basis of a flexible and concise statute. The more detailed the Statute, it was said, the more difficult would be the problem of reconciling the existing different legal systems. The statement of law in the "general part" of the Statute, therefore, should reflect a common and balanced approach drawing upon all the major legal systems of the world.

184. It was proposed that, in order to achieve a concise and flexible document, the Statute should provide for a mechanism or include a general mandating clause whereby the judges of the Court would elaborate the elements of the crimes set out in article 20 as well as the principles of liability and defence that were not otherwise set out in the Statute. Any rules to be elaborated by the judges would be of a subsidiary nature, conforming to the elements and principles laid down in the Statute. It was also proposed that the Court should be allowed to draw upon the major legal systems of the world to establish general principles of criminal law, the application of which would be subject to the approval of the States parties to the Statute. Some delegations were of the view, however, that conferring the substantive legislative power upon the judges of the Court would not be consistent with the principle of legality.

185. Furthermore, a number of delegations suggested that, in order to satisfy the requirements of fairness, transparency, consistency and equality in criminal proceedings, not only the fundamental principles of criminal law, but also the general and most important rules of procedure and evidence should be articulated in the Statute. It was also suggested that the principle of procedural legality and its legal consequences should be firmly established in the Statute itself. It was further stressed that the procedural rules of the Court should be determined not on the basis of which system of law was to be applied but rather by reference to the rules of law that would be more appropriate to ensure justice.

186. The view was generally expressed that the method used for the statutes of the International Tribunal for the former Yugoslavia and of the International Tribunal for Rwanda, which left it to the judges to elaborate and adopt substantive rules of procedure and evidence, was not an appropriate model for the elaboration of such rules for a permanent court to be established on a consensual basis by States parties to its Statute. At the same time, the relevance of certain specific provisions contained in their statutes,

particularly those relating to individual criminal responsibility, was noted by a number of delegations. Some delegations also drew attention in this regard to the relevant provisions contained in the Draft Code of Crimes against the Peace and Security of Mankind.

(b) Relevance of national law

187. The direct application of national law provided in article 33 (c) of the draft statute was viewed with concern by a number of delegations. It was remarked that in view of the divergences in national criminal laws and in the absence of precise rules in the provisions of article 33 as to which national law should be applied, a direct reference to national law would lead to inequality of treatment of the suspect and the accused in criminal proceedings and inconsistent jurisprudence. Some delegations considered that a certain residual role of national law should be recognized, bearing in mind that international law did not yet contain a complete system of substantive criminal law. Recourse to national law should be made only as a last resort, failing the application of the Statute, the relevant treaties and the principles and rules of general international law, and only to the extent that the rules of national law in question were consistent with the Statute. It was also suggested that the Court should apply national law concerning general rules of criminal law which were not addressed in the Statute and that the Statute should clearly determine which national law should be applied in each specific case. The view was also expressed that the proper applicable law would be the law of the State where the crime was committed but that other national laws might also be applied if considered fit by the Court under the circumstances of the case. It was also stated that the Court should take into account general principles of criminal law that were common to the major legal systems, rather than relying on the national law of a particular State to resolve issues in particular cases, which were not addressed in the Statute or the rules of the Court. The suggestion was also made that the reference to national law should be allowed for general rules of criminal law only and, as far as procedural rules were concerned, the Statute and the rules of the Court should be the exclusive sources of applicable law.

188. As regards the specific provisions contained in the draft statute relevant to the general rules of criminal law, the provisions of article 33 concerning applicable law were considered vague and should be revised by:
(a) substantiating in more detail the sources of the substantive law which the Court would apply; and (b) elaborating the essential elements of the general principles of criminal law, including the principles of liability and defence. Several specific proposals to this effect were submitted by delegations. It was also suggested that the primacy of the Statute and the order of relevance and applicability of other sources of applicable law should be made explicit in the revision of the article.

2. Substantive issues

(a) Non-retroactivity

189. The principle of non-retroactivity was considered fundamental to any criminal legal system. A number of delegations recognized the substantive link between this concept and article 39 of the Statute (*nullum crimen sine lege*) and suggested that the principle should be clearly and concisely set out in the Statute, even though some of the crimes referred to in the Statute were recognized as crimes under customary international law. It was further noted that the principle *nulla poena sine lege* also required that the principle of non-retroactivity be clearly spelled out in the Statute and that the temporal

jurisdiction of the Court should be limited to those crimes committed after the entry into force of the Statute.

(b) Punishment under customary international criminal law

190. The view was expressed that the principle of legality required not only clear definitions of the crimes under the jurisdiction of the Court which should be set out in the Statute, or in an annex thereto, but also a clear and full statement of the related punishment so as to avoid problems often associated with the issue of punishment under the different legal systems. However, doubts were expressed by some delegations as to whether customary international law covered the issue of punishment in relation to individuals held responsible for their acts or omissions.

(c) Individual criminal responsibility

191. It was generally accepted that the concept of individual criminal responsibility for the crimes, including those acts of planning, instigating and assisting the person who actually committed the crime, was essential and should be stipulated in the Statute. Some delegations suggested, therefore, that a provision laying down the basic elements of the responsibility should be included in the Statute itself. Reference was made to articles 7 and 6, respectively, of the Yugoslavia and Rwanda tribunal statutes. Other delegations were of the opinion that such an explicit and elaborate provision was not needed, as it could lead to complex negotiations, a lengthy statute and a difficult task of defining such elements as participation, conspiracy and complicity.

192. The view was also expressed that an essential question which should be addressed in the Statute was whether some kind of safeguard provision was needed to ensure that individual criminal responsibility did not absolve the State of any of its responsibility in a given case.

(d) Irrelevance of official position

193. Taking into account the precedents of the Nürnberg, Tokyo, Yugoslavia and Rwanda tribunals, there was support for the Statute to disallow any plea of official position as Head of State or Government or as a responsible government official; such official position should not relieve an accused of criminal responsibility. Some delegations thought that this issue could be included in relation to "defences". The opinion was also expressed that further consideration would be useful on the question of diplomatic or other immunity from arrest and other procedural measures taken by or on behalf of the Court.

(e) Criminal liability of corporations

194. Some delegations held the view that it would be more useful to focus attention on individual responsibility, noting at the same time that corporations were in fact controlled by individuals. Several delegations stated that such liability ran counter to their domestic law. The point was made, however, that the liability of a corporation could be important in the context of restitution. It was recalled that the principle had been applied in the Nürnberg Judgement.

(f) Appropriateness of the statute of limitations

195. Some delegations were of the view that, owing to the serious nature of the crimes to be dealt with by the Court, there should be no statute of limitations for such crimes. On the other hand, some delegations felt that such a provision was mandatory and should be included in the Statute so as to ensure fairness for the accused. The view was expressed that statutory limitation might apply to crimes that were relatively less serious than that of genocide or crimes against humanity.

196. In the view of some delegations, this question should be considered in connection with the issue of the availability of sufficient evidence for a fair trial. Some delegations suggested that, instead of establishing a rigid rule, the Prosecutor or the President should be given flexible power to make a determination on a case-by-case basis, taking into account the right of the accused to due process. In this connection, it was noted that article 27 of the Statute was relevant to this issue. It was suggested that an accused should be allowed to apply to the Court to terminate the proceedings on the basis of fairness, if there was lack of evidence owing to the passage of many years.

(g) Actus reus

197. The general view was that a provision on the objective elements of omissions should be established to set out clearly and carefully in the Statute all conditions under which a crime could be committed, and that this should not be left to the discretion of the Court, especially when considering that it would be placed in the difficult position of choosing between the different rules in the various national legal systems. Some delegations were of the view that it would not be necessary to include such a provision, and that it would be sufficient to have the definition of the crimes in the Statute.

198. Regarding the element of causation, several delegations were of the view that it was not necessary to include causation in the Statute, as it was largely a factual matter which the Court itself could consider and decide upon. Still other delegations felt it was preferable to include rules on causation and accountability.

(h) Mens rea

199. A general view was that since there could be no criminal responsibility unless mens rea was proved, an explicit provision setting out all the elements involved should be included in the Statute. There was no need, however, to distinguish between general and specific intention, because any specific intent should be included as one of the elements of the definition of the crime.

200. Regarding recklessness and gross negligence, there were differing views as to whether these elements should be included. Motives were seen as being relevant at the penalty stage of the proceedings. There were also doubts expressed concerning the appropriateness of including these elements in the Statute.

201. The need for including a provision setting an age limit at which an individual could be regarded as not having the requisite mens rea was widely supported. The question of what that age should be, however, would require common agreement. There was support for various proposals to this effect, including one that would give the Court discretion to evaluate an offender - within a certain age range - as to his or her maturity at the time of the commission of the crime. Attention was also drawn to a number of international

instruments relevant to this issue, including the Convention on the Rights of the Child.

(i) Other types of responsibility

202. The view was expressed that such types of responsibility as solicitation, attempt, conspiracy, aiding and abetting, accessory after the fact, complicity and responsibility of superiors for acts of subordinates were also important and relevant to the task of the Preparatory Committee and, according to some delegations, they should be defined in the Statute. Several delegations stressed the need to resolve these issues in the Statute having regard to the different meanings and definitions used in national laws.

203. As to the definitions themselves, the opinion was expressed that the terms of incitement would have to be carefully worded so as to avoid any violations of the right of free speech. Regarding the crime of attempt, it was stated that something more than mere preparation was needed to qualify as an attempt; another suggested definition was one where the perpetrator had commenced the crime but failed to complete it. Concerning aiding and abetting and conspiracy, some delegations stressed that a formula acceptable to all would have to be found before it could be included in the Statute. The issue of the responsibility of superiors for acts of subordinates was viewed as critical and should be defined for inclusion in the Statute. It was further suggested that responsibility of superiors, in this regard, also might be relevant to the question of a defence. Reference was made to provisions of the statutes of the tribunals for the former Yugoslavia and Rwanda.

(j) Defences

204. Some delegations stated that they were still formulating their position with regard to this issue. It was generally felt, however, that it was necessary to set out the fundamental elements of defences, and, some delegations stated that the definitions contained in the Siracusa draft provided a good starting-point. Concern was expressed over adopting an overly generalized approach, particularly involving war crimes where specific defences already had been developed. The view was expressed that the list of defences should not be exhaustive given the difficulty of trying to cover every conceivable defence, while others believed that leaving to the Court the power to add other defences would be tantamount to giving legislative power to the Court. It was also generally felt that only defences relevant to the type of crimes under the Statute should be included. Accordingly, it was suggested, for example, that it was not necessary to include intoxication and insanity in the Statute. A proposal was made to add renunciation to the list of defences.

205. The view was expressed that it was not necessary to refer to mistake of law or fact as this was, to a large extent, a question of common sense. In other words, if a particular negation existed, then of course *mens rea* did not exist. Some delegations found it necessary that such provisions should be made.

206. The opinion was expressed that self-defence should also include defence of others, as well as the concept of pre-emptive self-defence. The latter was particularly important to military situations where it would be justifiable to act pre-emptively in response to an imminent threat of force. It was also suggested that the concept of proportionality should be inserted in the definition of self-defence.

207. Several delegations were of the view that defence of property was not needed because of the type of crimes over which the Court would have

jurisdiction, but the point was made that it would be relevant in cases of certain war crimes.

208. Attention was drawn to the need to avoid an overlap between superior orders, and necessity and duress in the Statute; specific language would, therefore, be required in defining these terms, especially considering the subtle distinction between necessity and duress. Doubt was expressed with regard to the need to include the law-enforcement defence.

209. Some delegations stated that they were still in the process of defining their positions on defences under public international law. Doubt was expressed over grouping together military necessity, reprisals and Article 51 of the Charter of the United Nations, and concern was also expressed over the inclusion of reprisals under defences.

210. The view was expressed that because many legal systems included the elements of aggravating and mitigating circumstances, these issues would need to be addressed in the Statute. The remark was made that perhaps they should be dealt with in connection with penalties.

(k) Penalties 11/

211. It was generally stated that if the Court was to have jurisdiction over crimes, then it would have to impose penalties on individuals found guilty of those crimes. Whether specific penalties should be written in the Statute and, if not, what law applied in this regard would have to be discussed; article 47 of the draft statute offered a solution. The remark was also made that under paragraph 2 of article 47, preference was given to the law of the State where the crime had been committed. It was suggested that the issues relating to penalties, as well as to aggravating and mitigating circumstances, should be discussed fully at the resumed session of the Preparatory Committee under procedural questions.

G. Procedural questions, fair trial and rights of the accused

212. The Preparatory Committee considered this topic at its session in August 1996.

213. To facilitate and guide the discussion, the Chairman put forward a list of questions formulated in the context of certain specific articles of the draft statute prepared by the International Law Commission.

214. There was general agreement on the importance of the topic and the need to elaborate further the relevant provisions. Different views were expressed as to how best to meet this need. One view was that all the necessary principles and rules should be formulated in an integral manner, contained in the Statute or annexes thereto, and adopted by the States parties. Another view was that the Statute itself should contain only the general principles, leaving the implementation and subsidiary rules to be embodied in a second or third instrument; while these instruments could all be adopted initially by the States parties, the second and third instruments could be amended as needed by a simpler procedure (e.g., by the Court itself) without resorting to treating amendment provisions. Still another view was to assemble at the current stage those principles and rules deemed relevant and to leave the question of their placement for a later stage. The view was also expressed that it would not be practical to prepare all necessary rules down to every last detail and that the Court must be given the flexibility to add detailed rules, provided that they were consistent with the principles and rules laid down by the States parties.

215. A view was expressed that the procedural rules should maintain a balance between different penal systems of States and draw from their positive elements. Reference was made in this context to the penal law approach adopted by civil law States in matters dealing with hearings and investigations, steps which were taken to ensure equality between the prosecution and the defence, with regard to the means available to them, and in which the judge also played a more active role in conducting hearings. It was stressed that an international criminal jurisdiction should draw upon the practice of any system that could assist it in the performance of its functions. It should not be used as a standard to test the credibility of penal systems of individual States.

Article 25. Complaint

216. It was noted that the complaint should contain information sufficient to indicate that investigation by the Court was warranted and should meet a certain threshold in indicating that a crime had been committed that was within the jurisdiction of the Court and as to which the Court's exercise of jurisdiction was appropriate. The complaint should, also, address the issue of consent by a certain number of States, admissibility or complementarity, so as to assist the Court in determining whether it should take action in a particular case. It was further stressed that the purpose of the complaint should be to describe criminal acts which appeared to warrant investigation by the Court.

217. It was noted in this context, that, as a minimum, a complaint should contain information on: (a) the jurisdiction relied upon in making the complaint; (b) the circumstances of the alleged crime (e.g., specific criminal conduct occurring in a specific place and during a specific time); (c) the identity and whereabouts of any suspects, if known; (d) the identity and whereabouts of any witnesses, if known; (e) the location of evidence; and (f) details of any investigation carried out by the complaining State party or, to its knowledge, any other State.

218. Concerns were expressed however, about stipulating a mandatory list of requirements for a complaint, because such a list might make it more difficult for States with fewer resources to lodge a bona fide complaint. For that reason, some support was expressed for the words "as far as possible" in paragraph 3 of article 25, as they allowed a degree of flexibility.

219. As regards the wording of paragraph 3 of article 25, it was according to one view sufficient for the Statute; more detailed rules specified in the preceding paragraphs could be placed in a second-tier instrument. According to another view, the paragraph required detailed elaboration of the rules of procedure.

220. As regards the role of the Prosecutor, the following points were made: (a) he or she should be able to ask for clarifications of a complaint; (b) he or she should not be bound by allegations in the complaint about who is or should be a suspect or accused; (c) he or she should be able to pursue criminal acts that are closely related to those in the complaint or which form a continuing pattern of criminal activity; but (d) if the complaint is to serve as a trigger, the investigation should not stray into unrelated or clearly collateral matters. Views differed as to whether the Prosecutor was bound by the content of complaint or whether the Prosecutor's investigation might extend beyond the content of a complaint. One view supported the former, while another expressed preference for the latter. There were uncertainties as to whether a complaint by a State should be too specific or should only refer, as in the case of a referral by the Security Council, a situation to the Court.

221. With respect to who can make a complaint, different views were expressed. According to one view, only States parties should be empowered to lodge a complaint. Some delegations holding this view felt that the Security Council or the Prosecutor should not initiate proceedings before the Court. According to another view, States parties and the Security Council should be able to lodge a complaint. Some other delegations expressed the view that the Prosecutor should be allowed to initiate investigation based on any credible information provided to him or her from any source, whether as a result of inherent jurisdiction or referral of a situation by a State, the Security Council or another source, a model similar to that provided in the Statute of the International Tribunal for the former Yugoslavia.

222. The dual complaint system under article 25, one for genocide and the other for other crimes, was considered by some as undesirable. Preference was expressed for a single unified system, applicable to all crimes.

223. It was suggested that the question of the trigger mechanism be addressed in two separate articles, one dealing with complaints by States and the other complaints by the Security Council. This would allow any necessary special requirements to be prescribed for referral of situations to the Court by the Security Council under Chapter VII of the Charter.

Article 26. Investigation of alleged crimes

224. As regards the initiation of investigations, various suggestions were made for providing a minimum threshold, a screening mechanism or a judicial filter to distinguish between well-founded complaints of sufficiently serious crimes and frivolous or vexatious complaints. It was suggested that a State party, or a person referred to by name in a complaint, should be allowed to challenge before a trial chamber the submission of a complaint prior to the initiation of an investigation, on various grounds (e.g., the sufficiency of the complaint, the basis for jurisdiction and the admissibility of the case in terms of the principle of complementarity and the gravity of the alleged crime). A State party which was conducting a related investigation should also be allowed to send its objections to the Prosecutor.

225. Different views were expressed as to whether the Prosecutor should be authorized to initiate investigations ex officio. It was suggested that he or she should be authorized to do so based on sufficient, verifiable information received from any reliable source, with a view to strengthening the independence of the Prosecutor and the effectiveness of the Court.

226. With respect to the role of the Prosecutor, a spectrum of views were expressed: the Prosecutor should conduct an independent and impartial investigation on behalf of the international community and should collect incriminating and exonerating information to determine the truth of the charges and to protect the interests of justice; he or she should seek the cooperation of States in conducting investigations rather than carrying out such activities directly for reasons of efficiency and effectiveness, and the investigations would be conducted in accordance with the Statute and the rules of the Court as well as the national law of the State in whose territory the investigation was conducted; the Prosecutor should be able to seek cooperation directly from States or could be authorized to conduct direct investigations in exceptional situations in which there were concerns regarding the objectivity of the national authorities.

227. With regard to on-site investigations, different ways to conduct such activities were mentioned: the investigations should only be conducted with the

consent of the State concerned so as to ensure respect for its sovereignty, with the possible exception of situations in which the national criminal justice system was not fully functioning; the Presidency could empower the Prosecutor to conduct such investigations if there were no civil authorities to whom a request for assistance could be transmitted; the Presidency should appoint a judge or a chamber to supervise on-site investigations and thereby protect the rights of the suspect or the accused, whose counsel could also be present.

228. There was some question as to whether the Presidency was the appropriate body to issue investigative orders, with questions being raised as to the legal effect of such orders. It was stated that the reference to orders concerning "provisional arrest" in this context could create confusion with the use of this term in relation to extradition. It was suggested that an investigations chamber should monitor the investigative activities of the Prosecutor to give judicial authority to his or her actions to decide on requests for State cooperation, to ensure equality between the prosecution and the defence and to enable the suspect to request that certain investigations be carried out. Some delegations observed, however, that undue judicial control over the investigation would interfere with the separation of the judicial and prosecutorial functions. Such a chamber could also decide on objections of States to decisions on investigative measures prior to an indictment. However, the view was also expressed that such tasks could be entrusted to a single judge or magistrate rather than creating an additional chamber.

229. Attention was drawn to the need to consider further and clarify the standard to be applied by the Prosecutor in deciding whether to initiate an investigation or to file an indictment. It was suggested that the Prosecutor should, for example, have broad discretion to decide not to initiate or to discontinue an investigation or prosecution in the interests of justice owing to the age or illness of an individual or a national investigation or prosecution, or to have the authority to decline to investigate or to prosecute certain cases which were not of sufficient gravity and to select the most important cases when crimes were committed on a massive scale.

230. The view was expressed that the complainant State or the Security Council, as appropriate, should be informed of the Prosecutor's decision not to initiate an investigation or to seek an indictment. Any State whose cooperation had been requested during an investigation should also be informed of the latter decision. There were various suggestions to provide for the judicial review of these decisions by the Presidency, a trial chamber, an investigations chamber, an indictment chamber or a judge at the request of the complainant State, the Security Council or the victims. There was some question as to whether the complainant State or an appropriate judicial body should be entitled to initiate a review of such a decision and the manner in which the complainant State should submit its views. It was suggested, for example, that the judicial review should be based on a specific legal standard, such as that of manifestly inappropriate, which would defer to the appropriate exercise of prosecutorial discretion; that the authority of the judicial body should be limited to requesting the Prosecutor to reconsider a decision to preserve prosecutorial discretion and independence; and that the Prosecutor should be able to reconsider such decisions based on new information.

231. As regards the rights of the suspect, the view was expressed that they should be further elaborated in accordance with international standards and contained in a separate article. Emphasis was placed, inter alia, on the right of the suspect to receive a sufficient warning before being questioned, to remain silent during questioning, to not be compelled to testify or to confess guilt, to receive the assistance of competent counsel irrespective of the ability to pay for such assistance, to communicate in confidence with the

counsel, to equal protection before the law and in the case of a minor to be dealt with in a manner that takes account of the child's age. It was stated that, if the accused decides to testify, his or her testimony may be used as evidence in the trial. The view was expressed that the enumeration of the rights of the suspect should, however, be non-exhaustive.

Article 27. Commencement of prosecution

232. It was suggested that the indictment filed by the Prosecutor in a particular case should contain more detailed information than that stipulated in paragraph 1 of the article. However, if the evidence collected in the case was excessive, a summary could be provided to the reviewing body, which would have the right to request further information as needed.

233. As regards the reviewing body, concerns were expressed over the concentration of authority vested with the Presidency as envisaged in the draft statute, and it was suggested that it would be more appropriate to give certain pre-trial responsibilities to another body, independent of the Prosecutor and the trial, and appeals chambers. In this connection, it was proposed that a pre-trial, indictment or investigations chamber be established to examine the indictment and to hold confirmation hearings, which would provide the accused with further necessary guarantees considering the very public nature of an indictment for serious crimes. The point was made that a permanent reviewing chamber would have the advantages of consistency of approach and avoidance of difficulties associated with a rotation of judges.

234. It was also suggested that either a single judge or a panel of three judges, serving on a rotational basis, should have the function of ruling on pre-trial matters. The same judge performing pre-trial functions should not, however, be involved with the case at later stages. In addition, the judges of the reviewing body should not be of the same nationality as the accused.

235. Regarding the standard on which the indictment would be based, the statement was made that whatever standard was ultimately employed should be sufficiently high to justify trial proceedings. It was suggested that the timing of the exercises contained in paragraph 2 (a) and (b), i.e., determination of a prima facie case and the admissibility of a case before the Court, should be clearly delineated.

236. The view was expressed that the Statute should address the Court's ability to issue arrest warrants prior to any confirmation of an indictment, as well as the need to maintain the confidentiality of an indictment until the arrest is made, in order to ensure the custody of the suspect and to prevent the destruction of evidence. It was further proposed, as also provided for in rule 61 of the Rules of Procedure of the International Tribunal for the former Yugoslavia, that provision should be made in the Statute allowing for seizure of the accused's assets under certain circumstances.

237. With respect to paragraph 3, it was proposed that in those cases where the reviewing body refused to confirm the indictment it should indicate the reasons for its refusal.

238. As regards the requirements under paragraph 4, it was pointed out that the grounds for amendment of the indictment should be clarified. One view was that any amendments to the indictment should not result in the charging of new crimes against the accused. Before deciding upon an amendment of the indictment, the Court should hear the accused. Moreover, the requirement of notifying the accused of any amendments should be fulfilled promptly and in the language of

the accused, in accordance with the International Covenant on Civil and Political Rights (art. 14, para. 3 (a)).

Article 28. Arrest

Article 29. Pre-trial detention or release

Article 30. Notification of the indictment

239. It was stressed that certain matters were within the purview of the State and others were within the purview of the Court and only those functions performed by the Court should be regulated by the Statute. It was recognized that the cooperation of States with the Court was essential for the carrying out of effective and efficient arrest and detention procedures. Attention was also drawn to proposals, submitted at the first session of the Preparatory Committee, for the reformulation of articles 28 and 29 so as to provide for greater clarification and more concise wording regarding arrest and detention.

240. As regards the arrest of the suspect, the view was expressed that the proceedings under article 28 should be conducted under the control of the relevant national authority. Moreover, since many countries would not accept the direct execution of an arrest warrant on their territory, the Statute should provide that States should execute the warrant on behalf of the Court.

241. It was suggested that the term "provisional arrest" used in article 28 should be replaced by another term to avoid improper analogizing to the extradition model.

242. It was deemed reasonable to hold the suspect for a period of 90 days to allow time for confirmation of the indictment considering the serious nature of the crimes in question and the complicated investigation that would ensue. On the other hand, the view was also expressed that the 90-day period was too long and should be reduced. It was also suggested that once the Presidency was satisfied that there was no prospect that the required arrest criteria would be met, the suspect should be immediately released. Concern was also expressed over the provision contained in paragraph 2 of article 28 allowing the Presidency to extend the 90-day period to a seemingly indefinite period of time, and in this regard the suggestion was made to have a fixed period. Provision could also be made for an extension based on compelling reasons.

243. It was felt that article 29 on pre-trial detention or release needed further clarification in respect, inter alia, of the determination by the judicial officer of the warrant duly served and the purpose of such determination. It was suggested that the determination of the lawfulness of the arrest or detention, as well as bail, should be made by the relevant national authorities. A view was expressed that what the Court could determine was the lawfulness of its arrest warrants and its requests for the detention of the suspect. However, the Statute should provide guidelines for the grounds for detention and release for those occasions when the Court had custody of the suspect.

244. It was proposed that, in accordance with the International Covenant on Civil and Political Rights, detention of a suspect before trial should be limited to exceptional cases, such as danger of flight of the suspect, threat to others or the likelihood of destruction of evidence. It was also suggested that provision should be made for other options, such as allowing the custodial State to guarantee the availability of the suspect before the Court without actually

detaining the suspect, or by placing the suspect under judicial remand, for example by confining him to his home.

245. It was considered useful to make clear in the provision on notification of the indictment, as contained in article 30, that State authorities should normally perform service of documents. It would not be cost-effective nor would it be necessary for reasons of fairness for the Registrar of the Court to travel to each country where the suspect was detained to serve the indictment.

Article 34. Challenges to jurisdiction

Article 35. Issues of admissibility

Article 36. Procedure under articles 34 and 35

246. As a general comment, it was noted that the provisions dealing with the organization of the trial should be more detailed than those provided for in the draft articles formulated by the International Law Commission. Such provisions should, in addition to providing for a speedy and fair trial, also provide for the following: protection of witnesses; right of the victim to reparation; possibility of trial in places other than the site of the Court; the possibility of trial *in absentia*, if the accused is a fugitive; confidentiality of information and evidence; and suppression of false evidence.

247. The discussion on articles 34, 35 and 36 was focused on three main questions and it showed that further elaboration and clarification were requested.

248. As regards the question of who may challenge the jurisdiction of the Court or object to the admissibility of the case (article 34), it was noted that the term "interested State" was too vague and should be defined as those States entitled to exercise jurisdiction, including the State of nationality of the accused, the State where the crime had been committed, the State of nationality of the victims and the custodial State. According to one view, such interested States should also be parties to the Statute. According to another view, there was no logical reason to deprive a non-State party that had a direct and material interest in the case of the right to challenge the Court's jurisdiction. Thus, according to this view, any State that had a right to consent to the Court's jurisdiction under the Statute should be able to challenge that jurisdiction. It was also pointed out that the accused should have the right to challenge the jurisdiction of the Court. The question was raised however as to whether the accused should be permitted to challenge the Court's jurisdiction on grounds of lack of consent where the State whose consent was required had not done so. The competence of the Court could be contested by the interested State or by individuals in question upon receipt of a notification of complaint by the Court, when a request for transfer had been made or at the beginning of the trial.

249. As regards the question of when such a challenge might be made (article 35), a preference was expressed for as early a time as possible. It was suggested that the right to challenge jurisdiction or admissibility should be limited to pre-trial hearings or to the commencement of the trial. To avoid any misuse of the Court or unnecessary expenditure, it was suggested that any challenge to jurisdiction or admissibility should be raised and decided upon before any step in the trial was taken. In addition, challenges to jurisdiction should be permitted only once and not at multiple stages of the process. Preference was expressed for limiting the time within which challenges to jurisdiction or admissibility might be made. It was noted in this regard that

States with an interest in a case should be given notice of indictment. This could be facilitated by notification of an indictment from the Court to all States parties. One delegation expressed the view that the case provided for in article 35 (c), inasmuch as it involved a question inseparable from the merits, could not constitute a preliminary objection and accordingly could not be treated as one.

250. It was stated that only in exceptional cases should challenges to jurisdiction be permitted during the trial. Such exceptional cases would include the discovery of new facts which could affect the question of jurisdiction. It was also noted that a fugitive at large should not be permitted to challenge jurisdiction, thereby taking advantage of the processes of the Court, while maintaining the option of refusing to submit to it if it ruled against him or her. The question was also raised as to whether an accused should be permitted to wait until the later stages of a trial to raise a jurisdictional challenge that could have been brought much earlier. A view was also expressed that there should be no distinction between the right of the State and that of the accused with regard to when either could challenge the jurisdiction of the Court. Hence paragraph (b) of article 34 should be deleted. It was further stated that an accused should not be able to challenge admissibility on the grounds of a parallel investigation by national authorities where those national authorities had in fact declined to challenge the Court's jurisdiction. These issues involved how best to allocate prosecutorial power between the Court and those States where the accused did not have a proper role.

251. As regards the procedure by which challenges could be made (article 36), different views were expressed. One view was that objections to jurisdiction should be raised before a chamber other than the trial chamber; such a chamber might be the indictment chamber or the investigative chamber. This procedure, it was suggested, was compatible with maintaining the independence of the trial chamber. According to another view, the question of objections to jurisdiction should be dealt with by the trial chamber itself. It was noted that there should be a decision as to whether decisions on challenges to jurisdiction or admissibility could be appealable. If so, the Statute should clearly provide the procedure for such appeals. It was also noted that article 36, paragraph 2, on the referral of a matter to the appeals chamber, required further guidance with respect to the prerequisites for such a referral.

252. It was stated that when an individual has been investigated and/or prosecuted by national authorities, the decision to override that national process should be by a two-thirds majority of the Court, in deference to national processes.

Article 37. Trial in the presence of the accused

253. Different views were expressed on this question. According to one view, trial in the presence of the accused constituted a fundamental right of the accused and this right must be observed. Consequently there could be no trial in absentia.

254. Another view was that the current context was different; it involved exceptional circumstances (e.g. crimes affecting the international community) and pertained to a special international judiciary organ which would not have an enforcement mechanism to ensure the presence of the accused. There was therefore room to consider trial in absentia at least in certain specific cases, such as the one in which the accused deliberately flees justice and every effort to bring him or her to trial has proved fruitless. It was stressed however that the rights of the accused must be fully guaranteed and the circumstances and

conditions clearly stipulated. In particular, the sentence would not be mandatory and if the accused were subsequently to reappear before the Court there should be a retrial.

255. Specific comments were made on the text of article 37.

256. Concerns were expressed over article 37, paragraph 2, which provided for exceptions to the general rule. It was pointed out that even the limited exceptions provided for in that paragraph were not in conformity with the rights of the accused as contained in various international human rights instruments and national constitutions, and should therefore be deleted. It was further observed that the reference to "ill-health" in paragraph 2 (a) constituted only a reason for the adjournment or the suspension of a trial and not for a trial _in absentia_; continuing _disruption_ of the trial caused by the behaviour of the accused was not a legitimate excuse and it should be remedied by such practical measures as the use of video conferencing or creating a security area for the accused, treating such behaviour as contempt of court. As far as trial _in absentia_ for reasons of security was concerned, it was noted that practical alternatives should be sought (e.g. temporary relocation of the Court or the use of video conferencing).

257. It was also observed that in the case of escape from bail or from lawful custody, the focus for the international community should be on cooperation in locating and re-apprehending the accused. The accused should be warned in advance that in case of escape he or she could be tried _in absentia_. It was suggested that the term "lawful custody" needed further clarification. It was also pointed out that the distinction between "deliberate absence" referred to in article 37, paragraph 4, and escape "from lawful custody" referred to in paragraph 2 (c) of the same article was not clear and should be clarified.

258. It was stressed that in cases of trial _in absentia_, the rights of the accused should be set out in detail to include, for example: the possibility for the Court to review the order to exclude the accused, the right of the accused to be informed (through the Registrar) of the proceedings, in case of sickness to be questioned whenever he or she is in the presence of his or her counsel and of the Prosecutor or to be always legally represented by a counsel of his or her choice (or appointed ex officio).

259. Specific comments were also made with regard to paragraph 4, which permitted the establishment of an indictment chamber for certain specific purposes in cases of the deliberate absence of the accused. Concerns were expressed that the effectiveness of the Court might be undermined in those cases. Support was expressed, however, for such an indictment chamber for the purpose of recording the evidence or issuing and publishing an international warrant of arrest for the accused. This should not, in some members' view, lead to either partial or full trial _in absentia_. The view was also expressed that trial _in absentia_ might take place when the accused was deliberately absent, or when the accused implicitly or explicitly waived his or her rights, provided that rigorous safeguards were taken to preserve the rights of the accused. It was further suggested that a verdict should not be reached nor imprisonment imposed in a trial _in absentia_. In any case, the trial should be reopened if it had already taken place _in absentia_. The accused should be able to challenge the admissibility of the evidence recorded in his or her absence. Also, the right of appeal against any decision granted _in absentia_ should be allowed so as to strike a balance between the necessities of justice and the rights of the accused.

Article 38. Functions and powers of the Trial Chamber

260. A number of general remarks were made in this regard: consideration should be given to when the trial chamber was constituted and whether pre-trial motions should be dealt with by another entity; the accused should be informed of the composition of the chamber to facilitate challenges under article 11; some matters addressed in paragraph 1 should be dealt with during the first appearance of the accused before a chamber rather than at the commencement of the trial; and pre-trial motions should be addressed, possibly along the lines of rule 73 of the International Tribunal for the former Yugoslavia.

261. As regards paragraph 1 (d), there were different views as to whether the accused should be allowed to enter a plea of guilty or not guilty and the consequences of a guilty plea. The view was expressed that the accused should be allowed to enter a plea of guilty, which would have the procedural effect of obviating the need for a lengthy and costly trial: the accused would be allowed to admit his wrongdoing and accept his sentence; the victims and witnesses would be spared any additional suffering; and the Court would be allowed to take the guilty plea into account in sentencing the convicted person. The accused should also be allowed to enter a plea of not guilty, so as to benefit from the presumption of innocence and to offer a defence without affecting the duty of the prosecution to prove the charges. A court was not bound to accept a plea or a recommendation for leniency.

262. In contrast, the view was also expressed that the accused should be able to acknowledge the deeds attributed to him or her and the Court should be able to consider this admission as evidence; the admission should not be the only evidence considered by the Court; the admission should not have any consequences for the trial procedures; the Chamber had a duty to determine the guilt or innocence of the accused notwithstanding an admission; and a full trial was necessary given the seriousness of the crimes and the interests of the victims as well as the international community. It was suggested that the Court should not have the power to convict the accused based solely on his or her confession or a single testimony; the Court should be subject to a minimum evidentiary rule concerning admissions or confessions made in Court; and the Court should be subject to a rule of legal reasoning for its decisions concerning guilt and the elements of the indictment, and therefore paragraph 1 (d) should be deleted. It was noted that this paragraph was contrary to the constitutions of some States and could prevent their acceptance of the Statute.

263. Attention was drawn to the need to bridge the gap between different legal systems, some of which did not provide for a plea by the accused with respect to the charges, with emphasis being placed on finding the common denominators in different legal systems. It was suggested that if the accused admitted the facts contained in the indictment, the trial chamber could decide to conduct an abbreviated proceeding to hear a summary of the evidence presented by the prosecution or to continue with the trial if the accused failed to reaffirm the admission or to accept the proceeding. It was further suggested that the trial chamber should determine whether the accused fully understood the nature and consequences of admission of guilt, whether the admission was made voluntarily without coercion or undue influence and whether the admission was supported by the facts contained in the indictment and a summary of the evidence presented by the prosecution before deciding whether to request additional evidence, to conduct an expedited proceeding or to proceed with the trial. It was stated that the Court must have the power to satisfy itself before taking a decision.

264. Paragraph 1 (d) was described as relating to the question of plea bargaining, which should be excluded given the fact that it is in contradiction with the structure of the Court and also given the serious nature of the crimes

which affected the interests of the international community as a whole. However, it was also stated that guilty pleas were not inseparable from plea bargaining.

265. Regarding paragraph 2, the view was expressed that the President of the chamber should play an active role in guiding the trial proceedings by conducting the debate and monitoring the manner in which evidence for or against the accused was reported. It was also stated that procedural matters relating to the order of presentation of evidence should be dealt with in the rules of procedure, while protective measures for victims and witnesses should be elaborated in the Statute.

266. As regards paragraph 3, it was suggested that joinder of accused and joinder of crimes should be addressed in the rules of procedure.

267. With regard to paragraph 4, the view was expressed that the principle of public trials should be clearly stated as the strong preference in the Statute and that any exceptions should be very limited. Suggested exceptions to this principle related to public order; the dignity of the proceedings; the security or safety of the accused, victims or witnesses; crimes allegedly committed by minors; and victim or witness testimony concerning sexual violence. Various concerns were expressed regarding the reference to "confidential or sensitive information". The power of the chamber to maintain order might obviate the need for conducting trials in the absence of a disruptive accused under article 37. The chamber should also have the power to impose sanctions for failure to respect its orders to provide deterrence, as in rule 77 of the International Tribunal for the former Yugoslavia. Decisions concerning in camera proceedings and the verdict should be announced in a public session.

268. A number of remarks were made concerning paragraph 5: subparagraphs (b) and (c) should be amended to refer to witnesses who appear before the Court; a new paragraph 5 (c) bis should be added to enable the chamber to request the assistance of States in taking witness testimony and producing documents or other evidence outside of Court; a chamber should rule at an early stage on the admissibility of evidence under paragraph 5 (d); the chamber should rule on evidentiary questions only after hearing the parties; and such matters could be addressed in article 44.

269. Regarding paragraph 6, it was suggested that the Registrar should be required to prepare a complete written record of the proceedings and possibly a video or audiovisual recording as well.

Article 41. Rights of the accused

270. It was recognized that respect for the rights of the accused were fundamental and reflected the credibility of the Court and that there was already a large body of international law on the subject, as contained in such instruments as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, standard minimum rules for the treatment of prisoners and the statutes of the Yugoslavia and Rwanda tribunals, which should be elaborated in the Statute. An issue which needed to be explored was the interaction of the Court and the national jurisdiction prior to the transfer of an accused to the Court. It was also noted that the fundamental rights of an accused to be treated equally by the Court, and the right of minors to be dealt with in a manner taking account of the child's age, needed to be explicitly addressed.

271. It was stated that the important right of the accused to be promptly informed of the charge needed further elaboration in the Statute, as well as a broader guarantee than was currently in the draft statute of speedy conduct of all proceedings. The point was also made that an expeditious trial process would prevent a guilty person from delaying the proceedings and would secure the early release of an innocent person. What was needed in this regard was a proactive court which would properly manage the case so as to achieve an early resolution of the case.

272. It was suggested that the Statute should provide for the appointment of counsel if the accused could not afford one. In this connection, a list of defence counsel should be developed to allow the accused a choice of counsel. It was pointed out that the qualification for defence counsel should be based on the capacity to practise before the highest criminal court in the country; in the case of court-appointed counsel, a panel could be established to review counsel according to such criteria as high moral character, competency and relevant experience. It was recommended that there be a presumption in the Statute in favour of the accused being represented by counsel. However, in the event the accused chose to conduct his or her own defence, given the grave crimes the accused would be charged with, consideration could be given to the Court's providing counsel to give legal advice to the accused if so requested. Moreover, provision should be made specifically for the right of confidential communication between the accused and the defence counsel.

273. Given the fact that the Prosecutor would have earlier access to evidence and other information, it was recommended that a mechanism be found that would neutralize any potential advantage of the Prosecutor over the defence.

274. It was stated that it was also fundamental to a fair trial that provision be made for the full disclosure of evidence by the Prosecutor to the defence, as well as a reciprocal duty of disclosure on the part of the defence, including notice to the Prosecutor of any alibi evidence the defence might bring before the Court during trial. It was also stated that the provision, contained in paragraph 2 of the article, requesting the Prosecutor to make available to the defence exculpatory evidence should also include the requirement to make available inculpatory evidence prior to the conclusion of the trial; others stated however that these provisions need further elaboration. It was further observed that the need to protect sensitive information supplied by a State would have to be balanced with the general duty to disclose.

275. It was also pointed out that the right to confront and cross-examine all witnesses was a fundamental right, and concern was expressed in this regard over the possible use of anonymous witnesses, since the defence's ability to probe the credibility of the witness to show a motive to lie or to show that a mistake had been made depended to a large extent on who the witness was. The view was further expressed that there was a need to take into account special measures for a child witness.

276. The right of the accused not to be compelled to give testimony was supported, as was the right of witnesses to enjoy some degree of protection from giving self-incriminating testimony.

277. Concerning the need for the translation of documents, a suggestion was made that the Statute should not allow for the translation of all relevant documents if the accused's counsel had command of either of the working languages of the Court. The question of the costs involved in the translation of documents was also raised.

278. It was recommended that provision be made in the Statute for the right of the accused to compensation in the event of reversal of or pardon on the ground of newly discovered evidence.

279. With respect to specific drafting points, it was suggested, for example, that the words "subject to article 43" contained in paragraph 1 be replaced with "having due regard to article 43" so as not to place the rights contained in article 43 in a superior position over the rights of the accused. It was further suggested that the words "subject to article 37 (2)" contained in paragraph 1 (d) should be deleted.

Article 43. Protection of the accused, victims and witnesses

280. It was pointed out that the article was of a very general nature and should be further elaborated and more precisely formulated. Attention was drawn in this regard to the principles of justice for victims of crimes contained in the 1985 United Nations Declaration on the topic, as well as principles, recently elaborated by an expert group, guaranteeing the rights and interests of victims in the proceedings of the Court. The view was also expressed that the protection of the accused, victims and witnesses should be the obligation of the State concerned. Given the importance of protecting victims and witnesses, it was further recommended that their protection should be addressed in a separate provision from that concerning protection of the accused. At the same time, the point was made that the Statute must contain a balance of rights between the two groups and that any protections bestowed on victims and witnesses should not undermine the right of the accused to receive a fair trial.

281. It was stated that measures of protection employed should be non-exhaustive. Reference was made to the witness protection programmes found in many national jurisdictions. It was suggested that provision be made to protect the identity of victims and witnesses in particular cases which, at the same time, would not unduly prejudice the defence. It was further suggested that the Court should obtain the cooperation of the victim or witness before offering any type of protection. The view was also expressed that victims and witnesses should be encouraged to come forward, and in this connection a Court should be created that treated these individuals with concern and respect. Particular concern should be given to children and the mentally impaired and victims of sexual assault. Proposals were also put forward regarding the need to keep victims and witnesses informed of the progress of the case. Attention was drawn to proposals, as well as the precedent of the Yugoslavia Tribunal, for a witness and victim unit to be established to provide services and support to victims and witnesses, under the supervision of the office of either the Registrar or the Prosecutor.

282. It was recommended that provision be made in the Statute for payment of compensation to victims who have suffered damages. Several proposals were made concerning this issue, including the possibility of the Court being empowered to make decisions on these matters, among them the administration of a compensation fund, as well as to decide on other types of reparation. It was further proposed that both the victim and the accused should be allowed to take part in such a proceeding. Concern was expressed however over the Court's ability to follow through adequately and to ensure that restitution was made. The view was also put forward that since the question of compensation was essentially a civil matter, the Court could decide the scope of the victimization and determine the principles relating to compensation for damage caused to the victim; relying on this judgement, the victim could pursue the matter of remedies through the

appropriate national jurisdiction, which would be bound by the decision of the Court.

283. With respect to specific drafting points, it was suggested that the words "subject to article 41" should be added to article 43.

Article 44. Evidence

284. Among the questions raised by this article was that of whether the rules of evidence should appear in the Statute or in the rules of procedure of the Court or in some other form.

285. It was noted that the rules of evidence constituted an integral part of the due process of law and of the rights of the accused.

286. A commonly shared view seemed to be that fundamental or substantive principles of evidence should figure in the Statute itself while secondary and subsidiary rules could appear in the rules of the Court or other instruments. This approach would be more flexible since the latter could be more easily amended than the Statute and would also allow the Court the flexibility to adopt rules according to its practice and requirements. Certain examples of such principles were given: the judicial notice, the presumption of innocence of the accused, the capacity of witnesses to testify, the right to refuse to answer incriminating questions or the evaluation of documentary evidence. Written proposals were submitted for that purpose. It was recognized however that the task would be difficult since it would first involve a selection of the fundamental principles from the main legal systems of the world and would then entail a differentiation between the principles, the rules and the subsidiary rules.

287. The issue of perjury was also at the centre of the debate on the article. One view was that States parties should extend their national laws on perjury to cover evidence given by their nationals before the Court. The Court should only be concerned with whether perjury had taken place; the consequences of perjury should be left to the States concerned. In effect the jurisdiction of the Court would only cover crimes defined by the Statute.

288. Another view was that the Court should be able to control its proceedings, address the reliability of evidence presented and impose penalties in case of perjury; to leave such issues to States would entail many legal and practical difficulties, lengthy proceedings and jurisdictional conflicts. Rules concerning perjury should therefore be included in the Statute. The view was also expressed that the term "perjury" should be replaced by the words "false testimony", that false testimony should be made an offence under the Statute and that the Court should be empowered to order the arrest of a suspect for this offence and his trial by a specially constituted chamber.

289. Another issue related to the means of obtaining evidence and the exclusion of evidence (of article 44, para. 5). This raised, inter alia, the important question of judicial cooperation between the Court and national jurisdictions since very often evidence presented to the Court would have been obtained in the States concerned, in accordance with their national rules. Consideration was given to the possibility for the Court to inquire whether such evidence had been obtained in accordance with national rules. It was suggested that a mechanism should be created whereby the Court, in cases of allegations of evidence obtained by national authorities by illegal means, could decide on the credibility of the allegations and the seriousness of "violations". According to another view, the Court should not get involved in intricate inquiries about

domestic laws and procedures and it should rather rely on ordinary principles of judicial cooperation. It should apply international law and should exclude, for example, evidence obtained in violation of fundamental human rights, or minimum internationally acceptable standards (such as the Guidelines of the United Nations Congress on Prevention of Crime and Treatment of Offenders), or by methods casting substantive doubts on its reliability.

Article 45. Quorum and judgement

290. With respect to the question of quorum and presence in the trial chamber, a general view seemed to be that the number of the members should preferably be odd (e.g., five) and that all members as well as the Prosecutor should be present at all stages of the trial in the interests of due process and fair trial (the same judges should be present at all hearings when relevant evidence was given, for example). A temporary absence of a judge should result either in the continuation of the trial with the remaining judges or the suspension of the trial. In case of prolonged absence of a judge, replacement should take place.

291. As for the method of decision-taking in the trial chamber, some delegations expressed the view that it should be by a majority of judges, although some supported a unanimity rule (at least in case of a conviction). The judgement should be in writing and as complete as possible, including the questions of the competence and admissibility, as well as reasons for the judgement. The view was also expressed that the Court should have power to convict the accused on the strength of evidence put forward of a crime different from that included in the indictment provided that the accused had an opportunity to defend himself or herself and that the punishment to be imposed would not be more severe than the punishment which may have been imposed under the original indictment.

292. A view was expressed that there was no need to hold two separate hearings - one for the conviction or acquittal of the accused, and one for the sentence, since no jury trial was envisaged and both issues would be decided by judges. It was also suggested that in case of conviction, compensation for the victims or restitution of goods should be considered when appropriate. The view was also expressed that the accused, when sentenced, should be notified of his right of appeal and the time limit within which that right must be exercised.

293. Another issue was how to deal with dissenting or separate opinions. A view was expressed that such opinions should be made known together with the majority decision, as this would be consistent with the established practice in national and international courts; they might also become particularly relevant in cases of appeals or retrials. Another view was that the criminal proceedings were completely different from proceedings involving civil cases and that dissenting or separate opinions would undermine the credibility and authority of the Court.

H. Appeal and review

294. Three substantive issues were raised regarding appeal: (a) the grounds of appeal, (b) the persons who have the right to appeal, and (c) the proceedings on appeal.

295. Some support was expressed for the grounds enumerated in paragraph 1 of article 48: procedural error, error of fact or of law, or disproportion between the crime and the sentence. Whether an appeal on the grounds of jurisdiction and admissibility would be possible and at which point it should be made were issues also raised and it was suggested that they should be considered further. A suggestion was that appeals of the Prosecutor should only be allowed on the

ground of error of law. Another view was that the grounds of appeal for the Prosecutor and the accused should be the same. It was also suggested that the ground of disproportion between the crime and the sentence as well as the notion of procedural error needed to be further clarified and elaborated. One view was that the convicted person should be able to appeal on any substantive grounds. If the appeal by the convicted person was general (i.e., not only against the sentence), the appeals chamber should re-examine the case in its entirety. The idea was expressed that the right of appeal should be made available as broad as possible without the appellant having to justify why this recourse was sought.

296. As for the question of the proceedings, it was pointed out that a provision on the time period in which an appeal ought to be made should appear in the Statute (for example 30 days or longer should the Presidency allow it). Stress was placed upon the necessity to include more detailed and specific provisions concerning the manner in which the appeals chamber would apply rules of procedure and evidence.

297. It was also suggested that the judges of the appeals chamber should have the right to make public their dissenting opinions. The opposite opinion was also put forward: it was suggested that the number of judges should be odd (for example, seven).

298. In case of new evidence, a suggestion was that the appeals chamber should be able to transmit the case for review to the trial chamber with different composition. It was stressed that a complete separation of membership between the trial and appeals chambers was necessary. Terms such as "unfair [proceedings]" or "error of fact or law" in article 49 were considered unclear and in need of further clarification. It was also considered necessary to define clearly the criteria according to which a new trial should be ordered as distinguished from those for a reversal or an amendment of a decision.

299. With regard to the effect of an appeal, it was suggested that unless the trial chamber decided otherwise, a convicted person should remain in custody pending an appeal, though the appeal should have an effect of suspending the execution. The idea was also expressed that during the appeal the execution of sentence should be suspended and the accused should be detained as long as the trial chamber is determining its decision.

300. As concerns the question of the revision of a conviction, it was felt that the grounds should go beyond those indicated in article 50 and should possibly include cases where evidence proved to be false or invalid, a grave violation of duties of judges had occurred, or when new facts had come to light which were unknown at the time of the trial. But the grounds for revision should be more limited than those for appeal. It seemed to be a general view that revision should not be subject to a time limit and could take place at any time (even after the death of the convicted person, if requested by his or her relatives or any other person concerned).

301. It was considered necessary to elaborate the rules for the determination of when to constitute a new trial chamber or reconvene the trial chamber or to refer the matter to the appeals chamber.

302. In case of a revision of a conviction or of acquittal of a convicted person, it was suggested that provision for compensation should be included in the Statute.

I. Penalties

Article 46. Sentencing

Article 47. Applicable penalties

303. Two main issues emerged from the discussion: the type of penalties and the relevant laws for determining penalties.

304. It was noted that the principle of legality (nulla poena sine lege) required that penalties be defined in the draft statute of the Court as precisely as possible. The link was stressed between sentencing and penalties which should reflect the different degrees of culpability. A view was expressed that maximum and minimum penalties for each crime should be carefully set out in the draft statute. There was also a suggestion to include detailed regulations concerning, for example, minors, aggravating or attenuating circumstances (severity of damage or injury, prior conduct of the accused, means of commission of the crime, etc.), cumulative penalties for multiple crimes, an exhaustive list of aggravating circumstances and a non-exhaustive list of attenuating circumstances. Other delegations expressed support for the more flexible approach of the draft proposed by the International Law Commission, owing to the difficulties of reaching agreement as to specific rules in this matter.

305. It was considered that deprivation of freedom would form the basis of penalties under the Statute. Some delegations expressed some difficulties with the concept of life imprisonment. Some others considered that life imprisonment and imprisonment for a specified period of time (years and/or months) should be the basic penalties under the draft statute. Fines as a separate penalty were considered inadequate in view of the seriousness of the crimes and, moreover, the Court might have difficulty collecting the fines owing to the lack of an enforcement mechanism under the draft statute. It was recognized however that fines might be appropriate for such "procedural" crimes as perjury or contempt of court or as supplementary to a penalty of imprisonment or as penalties to be applied to juridical persons. Other penalties suggested for imposition included disenfranchisement, denial or suspension of political rights or public office for the convicted person and forfeiture of property.

306. Some delegations expressed their strong support for the exclusion of the death penalty from the penalties that the Court would be authorized to impose in accordance with article 47 of the draft statute. While the death penalty was ruled out by those delegations, others suggested that the death penalty should not be excluded a priori since it was provided for in many legal systems, especially in connection with serious crimes.

307. It was also noted that provisions concerning compensation of victims, restitution of property acquired through crime and the confiscation of property of the convicted person, as well as provisions concerning penalties for juridical persons (political organizations, trade organizations and other organizations) such as dissolution, confiscation and the like, should also be considered for inclusion in the draft statute. Many problems were raised in connection with the complex issue of compensation for the victims, including compensating a large number of victims of civil war, locating the source of funding and establishing criteria for distributing funds. Reference was made to the ongoing work on reparation for victims of crime under the auspices of both the Commission on Human Rights and the Commission on Crime Prevention and Criminal Justice.

308. Regarding the relevant laws for determining penalties, various comments were made with respect to the States whose national laws the Court might take

into account: (a) the State of nationality of the convicted person; (b) the State where the crime had been committed; and (c) the State which had custody of and jurisdiction over the accused. A view was expressed that taking into account the various national laws had the drawback of vagueness and imprecision, which could be contrary to the principle of legality. Moreover, this could result in manifest inequality and inconsistency, since domestic laws were not always identical in the penalties prescribed even for the same crimes. The idea was expressed that recourse to internal law should be used on a subsidiary basis and could only be applied if it did not run counter to international criminal law. One suggestion was that the draft statute should include an international standard for the various crimes; the jurisprudence and the experience of the Court could gradually expand this area. Another view, however, considered that the "renvoi" (referral) to national legislation could constitute a compromise among differing concepts and a solution to the difficult problem of determining the gravity of penalties. In the event that the national legislation did not provide for a specific crime, its provisions for an analogous crime could be taken into account.

309. It was suggested that the Court should have competence to impose appropriate punishment in cases where the convicted person was sentenced for a lesser crime than that for which he or she had originally been indicted. It was further suggested that the period of incarceration already served by the convicted person prior to trial should be taken into account in his or her serving of the term of imprisonment.

J. Cooperation between States and the International Criminal Court

1. General issues relating to States' cooperation with the Court

310. The view was widely shared that since the proposed International Criminal Court would not have its own investigative or enforcement agencies, the effectiveness of the Court would depend largely upon the cooperation of national jurisdiction in obtaining evidence and securing the presence of accused persons before it. It was considered essential, therefore, that the Statute provide the Court with a sound, workable and predictable framework to secure the cooperation of States. There was the position that the legal framework governing cooperation between States and the Court should be broadly similar to that existing between States on the basis of extradition and legal assistance agreements. This approach would ensure that the framework of cooperation would be set forth explicitly and the procedure in which each State would meet its obligations would be controlled by its national law, although there would be instances in which a State must amend its national law in order to be able to meet those obligations. There was also the position, however, that the Statute should provide for an entirely new regime which would not draw upon existing extradition and legal assistance conventions, since the system of cooperation between the Court and States was fundamentally different from that between States, and extradition existed only between sovereign States. The obligation to cooperate imposed by the Statute on States parties would not prevent the application of national laws in implementing such cooperation.

311. The principle of complementarity was considered particularly important in defining the relationship and cooperation between the Court and States. It was suggested that the principle called for the establishment of a flexible system of cooperation which would allow for special constitutional requirements of States, as well as their obligations under existing treaties.

312. It was noted that the nature and scope of cooperation was closely linked with the basic issue of the jurisdiction of the Court under article 20 of the Statute, and with such other issues as admissibility, consent mechanisms and the choice between "opt in" and "opt out" systems.

313. There was general support for the view that all basic elements of the required cooperation between the Court and States should be laid down explicitly in the Statute itself, while the list of such elements need not be exhaustive. It was suggested that a State would need to have a clear understanding of the types of assistance required to qualify their obligations in accordance with its domestic law, or to make provisions in their law for specific forms of assistance to be available.

314. As regards the question of the extent to which national law should be a source for determining the obligations of States under the Statute, the view was expressed that since the Statute was to provide all basic requirements of cooperation between States parties and the Court, national law should not be regarded as a source for determining such requirements, although the importance of its role in implementing the cooperation required by the Statute should be emphasized. It was noted further that, in order for the system of cooperation to be workable, there must be some deference to national law, but it could not be so dependent on national law that there would be real doubts about the extent to which States would provide meaningful cooperation of the Court in appropriate circumstances. The view was expressed by some delegations that matters of substance should be governed by the Statute and matters of procedure by national law.

315. Concerning the issue of the extent to which States parties to the Statute would be bound to grant assistance and cooperation to the Court, it was suggested that the obligations of States should be clearly and exhaustively defined in the Statute, together with the exceptions to that obligation. The suggestion was also made that the Statute itself should stipulate that in general a request of the Court was mandatory. The view was expressed, however, that the obligation could not be absolute, as inferred from the principle of complementarity. It was furthermore suggested that, if the jurisdiction of the Court was to be limited to the core crimes, there should be no need for acceptance of its jurisdiction by the State to cooperate, and some kind of safeguard should be provided to enable the Court to take further action should the State fail to comply with the Court's request. Some delegations also stated, however, that if jurisdiction was not limited to core crimes those States that had not accepted jurisdiction over a crime might not be obligated to cooperate. The view was expressed that precise mechanisms should be provided for situations where a State party refused to honour the Court's requests, and for cooperation with non-parties. Recourse to the Security Council in some cases was mentioned.

316. It was generally felt that the grounds for refusing compliance with requests from the Court should be limited to a minimum, taking into account the special character of the jurisdiction of the Court and the seriousness of the crimes to be covered under the Statute. Some exceptions referred to by delegations included deference to the principle of complementarity, urgency to exercise national jurisdiction, non-acceptance of the jurisdiction of the Court by the requested State, competing requests received by the requested State from the Court and from another State under existing treaty arrangements and constitutionally protected rights. The view was expressed by some delegations that essential security interests of the requested State should also qualify for refusal. As regards traditional exceptions to extradition, many of them, such as lack of dual criminality, political offence and nationality, were considered inappropriate in the light of the type of crimes to be dealt with by the Court.

The view was expressed that such traditional exceptions to extradition had their merits in this context.

317. It was noted that the relation between the obligations under parts 7 and 8 of the draft statute and existing conventions between States in the same area raised a particularly difficult problem. The point was made that the principle of complementarity would suggest that the requested State had the discretionary power to make a determination as to which request should have priority in the interest, for example, of effective prosecution. On the other hand, some delegations insisted on the primacy of requests from the Court, which would be established by an international convention and whose jurisdiction would be limited to core crimes, in the case where a State party had received competing requests from the Court and from another State party. The situations involving a competing request by a State which was not a party to the Statute was considered particularly complex and it was suggested that the matter should be examined further.

318. It was noted that additional discussions would be required to consider situations where the national authority of a State party did not exist for the Court to establish contact to seek cooperation.

319. The question was raised as to what would be the effect of the Court's exercise of inherent jurisdiction where the State requested to grant cooperation denied such cooperation without a justifiable reason. It was further stated that under the existing norms of international law, the State that did not comply with the obligations of the Statute would be held in violation of international law, which would impose State responsibility upon that State.

2. Apprehension and surrender

320. It was noted that the system of apprehension and surrender under article 53 of the draft statute, which embodied a strict transfer scheme without contemplating any significant role of the national courts and other authorities on the matter, was a departure from the traditional regime of cooperation between States established under the existing extradition treaties. In this regard, some delegations indicated that they were in favour of a system based exclusively on the traditional extradition regime, modified as necessary. Some other delegations supported the transfer regime as envisaged in the Statute. Some further delegations expressed their view in support of reconciling the two regimes so as to ensure the consistent application of the Statute. The suggestion was made also that, in order to facilitate its acceptance by States, the Statute should provide for a choice between a modified extradition regime and a strict transfer regime, subject to different national laws and practices. It was emphasized however that whatever might be its character, it was a unique system of cooperation which must be tailored to the special needs of the Court, taking into account national constitutional requirements, particularly those for guaranteeing the protection of the fundamental rights of individuals, and States' obligations under existing extradition treaties. It was further stated that the relationship between surrender and traditional extradition required further examination. The suggestion was made that the system of surrender should be extended to cover the convicted as well as the accused persons.

321. It was generally agreed that the basis for a request by the Court for arrest of an accused as a preliminary measure for surrender should be a warrant of arrest issued by the International Criminal Court in accordance with the provisions of article 26 (3) of the draft statute. It was considered that such a request to a State party should contain a full description of the identity of the person sought, together with a full summary of the facts of the case in

question, including details of the offence or offences of which the person was accused and a copy of a warrant for his or her arrest. Such information, it was said, should be provided at the time when the request was made, and not later as contemplated in article 57. In this regard, it was suggested that the Statute should formulate a procedure for what is the traditional form of provisional arrest whereby a request could be made in an abbreviated form in cases of urgency, to be followed by the transmission of a formal request for surrender accompanied by supporting documentation. As for the transmission of a formal request, it was suggested that, although some States might need to follow a modified extradition approach, rather than a pure transfer regime, documentary and evidentiary requirements under a modified extradition approach should be the least burdensome possible. In this connection, support was expressed for the proposal that States specify those requirements in advance at the time of their ratification or accession to the Statute. On the question of the means of transmission, it was stated that the Court should have the freedom of using in each case the channel and the method it deemed appropriate, including the use of new technology such as telefax.

322. The point was made that there should be a clear distinction between the Court's request for pre-indictment arrest of a suspect and the Court's provisional request for post-indictment arrest of an accused, pending the transmission of a formal arrest warrant. It was stated that, in either case, a warrant of arrest should be the basis for a request for arrest. Some delegations suggested that, if the warrant of arrest was issued in the pre-indictment stage, there should be a determination by national courts of some sufficiency of underlying evidentiary basis for the warrant and of the existence of a specific charge. A number of delegations felt, however, that there was no need to require the transmission of any evidence in support of the arrest warrant. Concern was nevertheless expressed that pre-indictment arrest was not permissible under certain constitutions, nor was the unusually long period of 90 days of the pre-indictment detention provided for in article 28 (2). As for a need for a provision in the Statute concerning arrest of persons other than the accused, doubts were expressed as regards the possibility of the Court's ordering the arrest and transfer of a reluctant witness. In this regard, it was considered preferable to ensure that the Court itself had flexibility to receive testimony taken outside of its seat with the assistance of States or through, for example, electronic means.

323. On the question of the role of national authorities, in particular the judiciary, in the execution of the Court's requests for provisional arrest, pre-surrender detention or surrender of the accused to the Court, there was general support for the view that the Statute should permit involvement of national courts in the application of national law where those requirements were considered fundamental, especially to protect the rights of individuals, as well as to verify procedural legality. Mention was made in this connection, of the difficulties that many States would have with a direct enforcement of an arrest warrant issued by the Court, as opposed to an indirect enforcement through available national mechanisms. It was suggested that, as a minimum, it should be possible to challenge in a national court of the requested State a document purporting to be a warrant - without the examination of the warrant in relation to substantive law - and that there should be a national forum in which to adjudicate upon any admissibility dispute, at least as regards double jeopardy. It was further suggested that issues of detention prior to surrender, including bail or provisional release, should be determined by national authorities and not by the International Criminal Court, as envisaged in the draft statute. It was considered necessary, however, that the requested State should ensure that the views of the Prosecutor in regard to any release of the suspect or the accused should be brought to the attention of the judicial officer. In this regard, it was emphasized that there must be a very close working relationship

between the Prosecutor and States parties in implementing the Court's request for assistance and surrender, and that the Statute should be sufficiently flexible so as to take this into account, while at the same time giving due attention to the rights of the individuals and the State's international obligations. The view was also expressed that the transfer of the accused to the Court or to the detaining State could be an appropriate point for shifting the primary responsibility over the accused from the national authorities to the International Criminal Court. With regard to the question of who should execute surrender, it was suggested that, for practical reasons, the Statute should provide for an option for execution by the custodial State, although there was also the view in favour of execution, in principle, by officials of the Court only.

324. With regard to the question of exceptions to the obligation to surrender, the view was reiterated that they should be kept to a minimum and that they should be specifically laid down in the Statute. In this connection, some delegations questioned the appropriateness of such traditional limitations or exceptions as the nationality of the accused, political or military offences, essential interests/ordre public or sufficiency of evidence. They also considered as inappropriate the principle of dual criminality, in view of the seriousness of crimes within the jurisdiction of the Court. Other delegations felt that some of these elements should be taken into account in laying down exceptions. Suggestions for possible exceptions included the principle of non bis in idem, non-acceptance of the Court's jurisdiction over a particular crime other than the crime of genocide, manifest errors of facts or law by the Court, the lack of a prima facie case, the statute of limitations, pendency of national proceedings relating to the same crime and competing requests from the Court and another State where the requested State might favour cooperation with that other State for effective prosecution of the crime, or might be obliged to render such cooperation to that other State.

325. On the rule of speciality, the view was expressed that, while some provision concerning speciality was required in order to safeguard the rights of the accused, the Statute should provide for application only to offences committed before surrender and also for the possibility of waiver by the States concerned. It was further noted that the question of competing international obligations would arise in respect of apprehension or surrender where a person whom the requested State had secured from another State for offences unconnected with the Court was transferred to the Court without the consent of that State. The view was also expressed that the Court should not, without the consent of the requested State, re-surrender to another State party or to a third State a person surrendered to it by the requested State in respect of offences committed before his surrender.

K. International cooperation and judicial assistance

1. Nature of assistance

326. While the term "judicial assistance" was described as sufficiently broad to cover the types of assistance envisaged, a preference was expressed for the term "mutual assistance" as a term of art used in recent legal instruments and as a more accurate description of the various types of assistance that might be required. A doubt was also expressed, however, concerning the appropriateness of the use of the term "mutual" considering the unique character of the Court.

2. Obligation of States parties to provide assistance (article 51, paragraph 1)

327. Several delegations expressed the view that the Statute should provide the legal basis for the obligation of States parties to provide the widest assistance to the Court and the general framework that would govern such matters. It was suggested that States parties should be required to use their best efforts in responding without delay to requests for assistance.

328. Some delegations expressed the view that the obligation to provide assistance should apply to all States parties, while others suggested that it should apply only to States parties which have accepted the jurisdiction of the Court with respect to the crime concerned. It was also suggested that requests for assistance should be made only after the Court had determined the question of jurisdiction, including State consent requirements, and the question of admissibility under the principle of complementarity.

329. While noting differences between the assistance to be provided by States to the Court and the traditional assistance provided between States in criminal matters, it was suggested that the Statute should be guided by the relevant existing conventions and the United Nations Model Treaty on Mutual Assistance in Criminal Matters. The view was also expressed that the Court could utilize existing arrangements for cooperation and mutual legal assistance in criminal matters.

3. Exceptions or limitations

330. The view was expressed that traditional exceptions to requests for assistance between States in criminal matters should not apply to the assistance to be provided to the Court given the serious nature of the crimes and the interest of the international community in the effective investigation and prosecution of those crimes. It was emphasized that any exceptions should be expressly provided in the Statute to provide predictability and uniformity with respect to the obligations of States parties, should be sufficiently narrow in scope to avoid abuse and should be kept to a minimum to avoid hampering the effective functioning of the Court. The view was also expressed that States could indicate the applicable exceptions under national law when becoming a party to the Statute. A question was raised as to whether the Statute would provide a self-contained regime of obligations and exceptions. A question was also raised as to whether the exceptions provided under international public law, such as reprisals or self-defence of States, would be applicable.

(a) National laws and constitutions

331. The view was expressed that national laws and constitutions should provide the procedures for implementing the requests for assistance but should not affect the obligation to provide such assistance under the Statute. It was suggested that national law could also provide the basis for the compulsory nature of investigative actions taken by the national authorities, such as search and seizure orders.

(b) Public or national security interests

332. While the view was expressed that national security interests should constitute a valid exception, as in existing conventions, concerns were expressed about recognizing a broad exception based on public or national security interests. It was suggested that consideration should be given to addressing the legitimate concerns of States regarding requests for information

or evidence relating to national security interests or other sensitive information while limiting the possibility of abuse which could impede the effective functioning of the Court.

(c) National investigation or prosecution

333. Some delegations expressed the view that the traditional exception to requests for assistance based on pending national investigations or prosecutions should not be applicable since the Court would consider this matter in determining the admissibility of a case under the principle of complementarity as a preliminary matter. Other delegations expressed the view that consideration should be given to providing a limited exception in situations in which complying with a request for assistance would interfere with an effective national investigation or prosecution.

(d) Political or military offences

334. Many delegations expressed the view that the traditional exception concerning political or military offences should not apply to requests for assistance.

(e) Dual criminality

335. It was suggested that the dual criminality requirement should not be applied to requests for assistance by the Court.

(f) Manifestly unfounded request

336. Some delegations expressed the view that a State party should be able to refuse to comply with a request for assistance which was manifestly unfounded.

4. General provision or enumeration (article 51, paragraph 2)

337. A number of delegations expressed the view that the Statute should contain a list of the types of assistance that might be requested of States parties so as to indicate clearly their obligations and to facilitate the adoption of implementing legislation. While several delegations favoured a non-exhaustive list to provide a measure of flexibility and to enable the Court to request appropriate kinds of assistance in particular cases not specifically envisaged in the Statute, other delegations favoured a comprehensive list to provide greater clarity concerning the obligation of States parties and thereby facilitate the enactment of implementing legislation. It was suggested that the list contained in article 51, paragraph 2, should be further elaborated based on existing instruments.

5. On-site investigations (article 26, paragraph 2 (c))

338. Several delegations expressed the view that the Prosecutor should not be authorized unilaterally to initiate and conduct on-site investigations in the territory of a State party without its consent since that authority would be contrary to the principle of State sovereignty; it would be difficult for the Prosecutor to conduct on-site investigations and to ensure compliance with divergent national and constitutional law guarantees of individual rights without the assistance of national authorities; and such authorization would go beyond existing international law and would not be generally acceptable to States.

339. The view was expressed that the on-site investigations envisaged under article 26, paragraph 2 (c), should be considered as a kind of assistance to be provided by States in response to an appropriate request from the Court. It was emphasized that on-site investigations should be carried out only with the consent of the State concerned and by its competent national authorities in accordance with the national and constitutional law guarantees of individual rights. The view was expressed that there might be a limited exception to the State consent requirement in extraordinary situations involving the referral of a matter to the Court by the Security Council under Chapter VII of the Charter of the United Nations. Other delegations felt that the Prosecutor should be authorized to carry out on-site investigations with the consent of the State concerned, and without its consent if the national authorities were unable to conduct an investigation that would meet the Court's needs. In the view of those delegations, it would be up to the Court to decide if that condition had been met.

6. Requests for assistance (article 57)

(a) Form and content of requests

340. Several delegations expressed the view that requests for assistance should include sufficiently detailed, relevant information concerning the crime, the alleged offender, the type of assistance requested, the reasons for requesting assistance and its objective as well as other relevant information depending on the type of assistance requested, such as the identity and location of the alleged offender, the identity and location of witnesses, the location of documents or other evidence. There was an indication of general satisfaction with article 57, paragraphs 3 and 4, while noting the possibility of further refinement based on the relevant instruments. It was suggested that it might be necessary to retain a degree of flexibility in view of divergent national law requirements.

(b) Competent authority for making such requests

341. The view was expressed that the Prosecutor should be competent to request assistance given his or her responsibility for the investigation and prosecution of alleged offenders. There were different views as to the extent to which the Prosecutor should be required to request the assistance of States in obtaining exculpatory information and evidence or the defence should be permitted to request the assistance of States in this regard. The view was further expressed that the Presidency, the Court or the trial chamber should also be competent to request assistance from a State party depending on the stage of the investigation or the judicial proceeding. It was suggested that the Court should be competent to request assistance either ex officio, upon the request of the Prosecutor or of the defence. It was also suggested that the Registry should be responsible for transmitting requests for assistance, as indicated in article 51, paragraph 2.

(c) Means of communication

342. Several delegations expressed the view that States parties should designate the competent national authority to receive requests for assistance to provide an expeditious and direct line of communication, as envisaged in article 57, paragraph 1. A preference was expressed for using diplomatic channels to communicate requests for assistance, while there was also an indication that this was not the current practice. It was suggested that there should be some flexibility to enable States parties to select different channels of communication.

343. In the view of some delegations modern means of communication should be used to facilitate expeditious communications, such as by fax or other electronic means. It was emphasized that it might be necessary to provide subsequently an original written request without delay to enable the national authorities to take appropriate action. However, concerns were expressed regarding the reliability and the confidentiality of such means.

7. Role of national authorities

344. It was emphasized that requests for assistance should be carried out by the competent national authorities in accordance with national law and constitutional guarantees of individual rights. It was also emphasized that it would be necessary for the national authorities to comply with relevant international standards in implementing the requests for assistance. It was suggested that the national authorities could carry out investigations pursuant to instructions provided by the Court and that the Prosecutor or staff members could be present during the investigation and possibly participate therein.

8. Non-compliance

345. The view was expressed that consideration should be given to situations in which a State refused to assist in an investigation in an attempt to shield an individual from criminal responsibility or was unable to provide such assistance owing to the lack of an effective, functioning judicial or legal system. It was suggested that it might be possible to envisage a role for the Security Council in certain situations. It was also suggested that the Statute should envisage a special chamber that would consider refusals or failures to comply with requests for assistance and render appropriate decisions.

9. Rule of speciality (article 55)

346. The view was expressed that the rule of speciality should apply to information or evidence transmitted to the Court by a State. There was an indication of general satisfaction with the limited rule contained in article 55, paragraph 2. Emphasis was also placed on envisaging an exception to the rule based on the express consent or waiver given by the State that had provided the information or evidence, with reference being made to article 55, paragraph 3. It was suggested that such an exception should be based on the consent or waiver of the accused. It was also suggested that the rule of speciality could be limited to situations in which the State concerned raised an objection.

10. Reciprocity

347. Some delegations were of the view that the rule of reciprocity should apply to the relation between the Court and States, to the effect that the Court should be under an obligation to comply with requests by States exercising jurisdiction in conformity with the notion of complementarity. The view was also expressed that the Statute should merely envisage the possibility of the Court providing information or evidence to a State to assist with a national investigation or prosecution of a similar or related case without overburdening the Court. Although some delegations raised this issue under the rubric of reciprocity, other delegations pointed out that since the Court would not be a State and could not be obligated to reciprocate assistance rendered by a State in a strict sense, it would be more appropriate to consider the issue as

possible cooperation provided by the Court to a State. It was further stated that a provision stipulating such cooperation by the Court could be included in the Statute. The view was expressed that the Court could not provide information obtained from one State to another State without the consent of the former State.

11. Assistance of non-States parties (article 56)

348. The view was expressed that non-States parties should be encouraged to provide assistance to the Court as envisaged in article 56. It was suggested that the Court should be authorized to enter into special agreements or ad hoc arrangements with non-States parties to encourage and enable such States to provide assistance to the Court in general or in particular cases. It was also suggested that reciprocity or mutual cooperation might be an important factor in obtaining the assistance of non-States parties.

12. Recognition of judgements and enforcement of sentences

349. It was generally recognized that because this subject involved novel features and therefore only preliminary comments could be made at the current stage, these issues would require further consideration and elaboration.

350. Concerning the issue of penalties, it was felt that penalties other than imprisonment, e.g., fines, restitution, compensation, might have to be considered under part 8.

(a) Recognition of judgements (article 58)

351. The view was expressed that by accepting the jurisdiction of the Court States parties would, by definition, recognize the Court's judgements. Therefore, it was not necessary to provide for a particular recognition procedure in the Statute. Article 58, therefore, should be modified to provide that a State not only should recognize a judgement of the Court but also should enforce the Court's sentences in its territory. The view was also expressed that States parties were bound to recognize the Court's judgements upon the entry into force of the Statute, and it was proposed that article 58 be amended by adding the sentence: "States parties have to recognize the judgements of the Court as judgements rendered by their national judiciaries." It was further proposed that, as a consequence of the rule of reciprocity, a provision in article 58 should stipulate that the Court also should recognize the judgements of the States parties.

352. Some delegations felt that automatic recognition of judgements and enforcement of sentences of the Court should be subject to the provision that recognition should not be inconsistent with fundamental provisions of the domestic law of States parties.

353. A contrasting view envisaged the Court as being on equal footing with national legal systems and that the Court's judgements, therefore, should not be automatically recognized, but rather examined by the national Court concerned.

354. There was support for both a method of continued enforcement and a national exequatur procedure. Regarding a national exequatur procedure, the point was made that the Statute should ensure that the reasons for a State's refusal to execute the Court's judgement were kept to an absolute minimum.

355. The need for article 58 was also questioned on the ground that if the Court was to impose only imprisonment, vis-à-vis fines or restitution, then article 59 alone would appear to specify adequately a State's obligation to the Court.

(b) Enforcement of sentences (article 59)

356. There was support among the delegations for the Court to designate a State where the sentence of imprisonment would be served from a list of States which had indicated their "willingness" to accept convicted persons. The view was further expressed that in designating a State the Court should take into account the interests of the Court itself and of the State concerned as well as the fundamental rights of the prisoner. The remark was made, however, that article 59 should be redrafted so as to exclude any element of "willingness" on the part of States parties in executing the Court's sentences, as this would run counter to the idea of the Court being an extension of the judiciary of the States parties. In other words, article 59 should make it clear that States parties would be obligated to execute sentences of the Court if they were so designated by the Court.

357. Concerning the issue of the supervision of a sentence of imprisonment, it was generally agreed that the Court should exercise control in critical areas, in order to ensure consistency and compliance with international norms regarding conditions of incarceration (e.g., the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners), and leaving to the custodial State the day-to-day supervision of the prisoner. The remark was also made that control by the Court was necessary to prevent national law being used, for example, to reduce a sentence imposed on a prisoner by the Court.

358. The point was also made that the issues of enforcement of sentences in article 59 and the issues of pardon, parole and commutation of sentences in article 60 merged to a certain extent, and that the temporary or permanent release of a convicted person should be decided upon by the Court. It was recognized that that might require the establishment of an additional arm of the Court to monitor when prisoners should be released.

(c) Pardon, parole and commutation of sentences (article 60)

359. The view was expressed that the issues of pardon, parole and commutation of sentences should be left to the Court. Another view supported the retention of paragraph 4 of article 60 as an essential provision in the Statute for a State's acceptance of prisoners.

360. There was also the view that since the Court was a judicial body and should not be put in a position to consider extra-legal matters associated with pardons and parole, perhaps a separate entity should be created to deal with these issues.

361. Remarks were made however questioning the role of the power of pardon since the Court's powers of revision, parole and commutation of sentences seemed sufficient to address the interests of the convicted person.

L. Other issues

362. It was suggested that the final clauses should provide a transitional arrangement for the transfer of cases from the ad hoc tribunals to the Court to avoid concurrent or parallel jurisdiction. However, attention was drawn to the differences in the temporal jurisdiction of the ad hoc tribunals and the Court, which obviated the need for such an arrangement.

363. Some delegations expressed their concern that there had been no negotiation of texts during the deliberations of the Preparatory Committee which would allow the fixing of a specific date for the holding of the conference. For those delegations, the date of the conference was closely linked to the progress in the preparatory work and its results.

364. The view was also expressed that the process of negotiation should be democratic and transparent, that the question of the scheduling of the conference was a political one and did not fall within the mandate of the Preparatory Committee and that it should be considered in a political body such as the Sixth Committee. According to the same view, taking a decision on the date of the conference before the trend of future developments became clearer might compromise the quality of negotiations in the future.

365. Other delegations, however, were of the view that in order to ensure an effective negotiating process it would be necessary to establish a deadline for the preparatory work and to that effect fix a date for the conference of plenipotentiaries in 1997.

M. Conclusions of the Preparatory Committee 12/

366. The General Assembly, by its resolution 50/46 of 11 December 1995, established the Preparatory Committee on the Establishment of an International Criminal Court and directed it "to discuss further the major substantive and administrative issues arising out of the draft Statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal Court as a next step towards consideration by a conference of plenipotentiaries", and decided "to include in the provisional agenda of its fifty-first session an item entitled 'Establishment of an international criminal Court', in order to study the report of the Preparatory Committee and, in light of that report, to decide on the convening of an international conference of plenipotentiaries to finalize and adopt a convention on the establishment of an international criminal Court, including on the timing and duration of the conference."

367. In accordance with its mandate, the Preparatory Committee discussed the major substantive and administrative issues arising out of the draft Statute and proceeded to consider draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal Court. The Preparatory Committee undertook its mandate on the basis of the draft Statute prepared by the International Law Commission, taking into account the report of the Ad Hoc Committee on the Establishment of an International Criminal Court, the written comments submitted by States to the Secretary-General pursuant to General Assembly resolution 49/53 of 9 December 1994 and proposals for amendments submitted by delegations and taking into account also the contributions of relevant organizations. Written proposals for amendments to the draft Statute of the International Law Commission already submitted by delegations or prepared by the Chairman are included in the present report in the form of a compilation (see vol. II). They contain consolidated texts prepared by informal groups without prejudice to the national positions of delegations.

368. The Preparatory Committee wishes to emphasize the usefulness of its discussions and the cooperative spirit in which the debates took place. In light of the progress made and with an awareness of the commitment of the international community to the establishment of an international criminal Court,

the Preparatory Committee recommends that the General Assembly reaffirm the mandate of the Preparatory Committee and give the following directions to it:

(a) To meet three or four times up to a total of nine weeks before the diplomatic conference. To organize its work so that it will be finalized in April 1998 and so as to allow the widest possible participation of States. The work should be done in the form of open-ended working groups, concentrating on the negotiation of proposals with a view to producing a draft consolidated text of a convention to be submitted to the diplomatic conference. No simultaneous meetings of the working groups shall be held. The working methods should be fully transparent and should be by general agreement in order to secure the universality of the convention. Submission of reports on its debates will not be required. Interpretation and translation services will be available to the working groups;

(b) To deal with by the following:

(i) Definition and elements of crimes;

(ii) Principles of criminal law and penalties;

(iii) Organization of the Court;

(iv) Procedures;

(v) Complementarity and trigger mechanism;

(vi) Cooperation with States;

(vii) Establishment of the International Criminal Court and its relationship with the United Nations;

(viii) Final clauses and financial matters;

(ix) Other matters.

369. The Preparatory Committee recalls that the General Assembly resolved in its resolution 50/46 to decide at its fifty-first session, in the light of the report of the Preparatory Committee, on the convening of an international conference of plenipotentiaries to finalize and adopt a convention on the establishment of an international criminal court, including on the timing and the duration of the conference.

370. Recognizing that this is a matter for the General Assembly, the Preparatory Committee, on the basis of its scheme of work, considers that it is realistic to regard the holding of a diplomatic conference of plenipotentiaries in 1998 as feasible.

Notes

1/ The list of delegations to the Preparatory Committee is contained in documents A/AC.249/INF/1 and A/AC.249/INF/2.

2/ Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), chap. II.B.I.5; and A/49/355, chap. II.

3/ Ibid., Fiftieth Session, Supplement No. 22 (A/50/22).

4/ A/CN.4/L.532 and Corr.1 and 3. This document will appear in Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10).

5/ General Assembly resolution 40/34, annex.

6/ E/CN.15/1996/16/Add.5, recommendation 2, annex.

7/ General Assembly resolution 49/60, annex.

8/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 22 (A/50/22).

9/ For further discussion on the role of the Prosecutor, see paras. 149 to 151 above.

10/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 22 (A/50/22).

11/ See also paras. 303-309 below.

12/ Some delegations expressed reservations on the conclusions of the Preparatory Committee and felt that these conclusions do not prejudge the position of the States in the General Assembly.